pliance Energy Conservation Act of 1987 (NAECA)[3]; the Energy Policy Act of 1992 (EPAct)[4]; and just recently, the Energy Policy Act of 2005.[5]

One critical component of this national energy policy was the enactment of comprehensive legislation governing the energy efficiency of certain consumer products (such as refrigerators, air conditioners, washers, dryers, ovens and water heaters, see 42 U.S.C. § 6292(a)), and commercial and industrial equipment (such as electric motors and pumps, and commercial heating and air conditioning equipment, see *id.* § 6311(1)). To promote energy conservation, Congress imposed numerous, specific and wide-ranging requirements related to energy efficiency. These include, among other things, standards limiting the products' permissible energy use, *id.* §§ 6295, 6313; test procedures to evaluate their energy use, *id.* §§ 6293, 6314; labeling requirements, *id.* §§ 6294, 6315; and requirements regarding the submission of product information to the Department of Energy, *id.* § 6296(d). See S. Conf. Rep. No. 94-516, at 119, 1975 U.S.C.C.A.N. at 1960 ("[EPCA] would require test procedures for, and energy efficiency labeling of, major home appliances").

This statutory scheme, comprehensive on its own, is supplemented by even more involved federal regulations promulgated by the Department of Energy and the Federal Trade Commission. The Department of Energy specifies in detail the manner in which regulated products must be tested. See generally 10 C.F.R. pts. 430, 431; *e.g.*, 10 C.F.R. §§ 431.16-.18, 431.76, 431.86, 431.96. Both the Department of Energy and the Federal Trade Commission regulate the labeling of these products, see 42 U.S.C. §§ 6294, 6315; 16 C.F.R.

---

[3] Pub. L. No. 100-12, 101 Stat. 103 (1987).

[4] Pub. L. No. 102-486, 106 Stat. 2776 (1992) (codified at 42 U.S.C. § 6311 *et seq.*).

[5] Pub. L. No. 109-58, 119 Stat. 594 (2005) (to be codified in scattered sections of titles 7, 15, 16, 25, 30, 41 and 42 of the United States Code).

§ 305.11-.12 & app.L; 10 C.F.R. § 431.30-.31, and impose requirements related to the submission of data to the federal government, see *e.g.*, 10 C.F.R. § 430.62, 431.36; 16 C.F.R. § 305.8, 305.11-.14. Moreover, the Federal Trade Commission makes available to the public, through a web site, information concerning the energy efficiency of many of the regulated products. See Federal Trade Comm'n, Appliance Energy Data, http://ftc.gov/bcp/conline/edcams/eande/appliances/index.htm (last visited Sept. 9, 2005).

These regulations are not only comprehensive, but extremely detailed. With regard to labeling, for instance, regulations specify not just the contents of the label, but the precise text, as well as the type font and size, the paper stock, and the placement of the label, among other things. 16 C.F.R. § 305.11 & app.L.

It is unsurprising, given Congress's goal of developing a "comprehensive" national energy policy—and the thorough statutory and regulatory regime that resulted—that, as part of these statutes, Congress enacted express preemption provisions. These provisions concern consumer appliances, see 42 U.S.C. § 6297, and industrial equipment, see *id.* § 6316.[6] They expressly preempt state energy standards and testing requirements. And, pertinent here, § 6297(a)(1) preempts "any State regulation [that] ... provides at any time for the disclosure of information with respect to any measure of energy consumption," so long as the State requires testing or information disclosure "other than" the federal requirements. *Id.* § 6297(a)(1).

These preemption requirements are an integral component of Congress's effort to promote energy conservation. The

---

[6] Consumer appliances are referred to in the statute as "covered products," *see* 42 U.S.C. § 6297, and commercial and industrial equipment are designated as "covered equipment," *id.* § 6316(a)(3), 6311(1). Section 6316 incorporates § 6297 by reference, and the two provisions are identical in all respects relevant here. Accordingly, this brief discusses the two provisions in tandem.

1987 act (NAECA), for instance, had "two central tenets," one of which was that "the bill preempts state law under most circumstances." H.R. Rep. No. 100-11, at 19 (1987). NAECA's preemption provision was "designed to protect the appliance industry from having to comply with a patchwork of numerous conflicting State requirements," *id.* at 24. Indeed, NAECA reasserted federal control in light of a "growing plethora of differing state regulations," and Congress intended, through the imposition of "uniform standards," to "bring a degree of regulatory ... certainty to the business planning of the appliance manufacturing industry, which has had to grapple in recent years with a growing number of differing State appliance laws and regulations." *Id.* at 28.[7]

Congress placed two important limitations on the otherwise expansive scope of the statutes' preemption. *First*, recognizing that some States might face unique circumstances, it included a safety valve. A State that wishes to impose an "energy conservation standard or other requirement with respect to energy use, energy efficiency, or water use" may do so if it demonstrates "unusual and compelling State or local energy or water interests." 42 U.S.C. § 6297(d)(1)(A), (B). Thus, a State that has interests "substantially different in nature or magnitude than those prevailing in the United States generally," *id.* § 6297(d)(1)(C)(i), may be excused from the otherwise broad scope of preemption, if it makes the relevant showing to the Secretary of Energy, 10 C.F.R. § 430.40-.49. (Notably, however, even where this safety valve is concerned,

---

[7] *Accord* S. Rep. No. 100-6, at 2 (1987), *reprinted in* 1987 U.S.C.C.A.N. at 52 (NAECA was meant "to reduce the regulatory and economic burdens on the appliance manufacturing industry"); *id.* at 4, 1987 U.S.C.C.A.N. at 54-55 (noting that under the existing state of the law, "appliance manufacturers were confronted with the problem of a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans. Regulations in a few populous States could as a practical matter determine the product lines sold nationwide, even in States where no regulations existed.").

national interests predominate. See 42 U.S.C. § 6297(d)(3)). *Second*, Congress expressly grandfathered in certain existing state requirements, see, *e.g.*, *id.* § 6297(c)(4), (5)—including provisions of the California Code of Regulations, see *id.* § 6316(b)(2)(C). Outside these circumstances, however, state law is broadly preempted.

2. At almost exactly the same time Congress enacted EPCA, the State of California undertook its own efforts to regulate energy policy generally, and energy efficiency specifically. In 1975 the California Legislature established the California Energy Commission (CEC),[8] Cal. Pub. Res. Code §§ 25200-25226, which, among other purposes, is tasked with studying "[i]mproved appliance efficiency," *id.* § 25401(d), and prescribing energy efficiency standards and labeling, *id.* § 25402(c)(1)-(2). CEC did not, however, regulate information disclosure until later.

At issue here are three regulations promulgated by CEC in 2002—namely, California Code of Regulations, title 20, §§ 1606-1608. Section 1606 directs manufacturers of numerous products (refrigerators, ice makers, air conditioners, ceiling fans, space heaters, lamps, and the like, see *id.* § 1606 tbl.V) to disclose detailed and voluminous information to CEC. The required information includes details about the manufacturer, see *id.* § 1606(a)(2), as well as identifying information about the product, such as the brand name and model number, *id.* § 1606 tbl.V. Furthermore, § 1606 requires the manufacturer to submit test results and test reports, the particulars of which are specified in minute detail, *id.* § 1606(a)(3)(A) (cross-referencing *id.* §§ 1603 and 1604, which specify test protocols), as is the manner in which these results must be reported, *id.* § 1606(a)(3)(E). The regulations further identify *several hundred* items of product-specific information that manufacturers must submit to CEC, many of

[8] "California Energy Commission" or "CEC" is the commonly used name for Respondent Energy Resources Conservation and Development Commission.

which relate to energy consumption.[9] These requirements are far more extensive than the federal government's disclosure requirements. For instance, manufacturers of residential gas furnaces must disclose only six or seven items of information to the federal government, see 16 C.F.R. § 305.8(a)(1), but they must disclose well over 20 pieces of information to CEC, see Cal. Code Regs. tit. 20, § 1606(a)(2) & tbl.V, at E; see also *id.* § 1606 tbl.V, at C (requiring manufacturers of residential air conditioners to disclose more than 20 pieces of information not required by federal regulation). This information is compiled by CEC into a database, *id.* § 1606(c), which is available to the public, see CEC, Appliance Efficiency and Appliance Regulations, http://www.energy.ca.gov/efficiency/appliances (last visited Sept. 9, 2005).

In addition to § 1606's information-disclosure requirements, § 1607 sets forth "marking" requirements—*i.e.*, labeling instructions. Specifically, the regulation requires that each appliance's name, model number and date of manufacture must be marked on the unit itself, Cal. Code Regs. tit. 20, § 1607(b) (with certain limited exceptions, *id.* § 1607(c)); that the products carry all of the markings required by the federal regulations listed at 16 C.F.R. pt. 305, see Cal. Code Regs. tit. 20, § 1607(d); and, furthermore, that certain federally regulated appliances must additionally be labeled with prescribed energy performance information, see *id.* § 1607(d)(2) & tbl.W.

The enforcement mechanism that stands behind these requirements is both powerful and destructive of interstate commerce. Simply put, no listed appliance may be sold in California unless, pursuant to § 1606, the manufacturer has submitted the required information to CEC and CEC has en-

---

[9] *See, e.g.*, Cal. Code Regs. tit. 20, § 1606 tbl.V, at C (requiring information about the motor type, fan motor design and nominal horsepower of a central air conditioner); *id.* § 1606 tbl.V, at F (voltage of heat pump water heaters); *id.* § 1606 tbl.V, at K (wattage of lamps); *id.* § 1606 tbl.V, at S (rated horsepower of electric motors).

tered the information into its database, and unless the labeling requirements of § 1607 are met. See *id.* § 1608(a).

II. PROCEDURAL BACKGROUND

1. CEC adopted the challenged regulations in 2002. Before the regulations went into effect, the four trade associations that are petitioners here ("the Associations") sought a preliminary injunction to prevent implementation of the regulations. The district court granted a preliminary injunction as to most of the challenged provisions. Pet. App. 26a-27a.

In response to the injunction, the CEC undertook an emergency rulemaking by which it amended certain of the state regulations, Pet. App. 27a, and which mooted certain aspects of the Associations' challenge. That rulemaking did not resolve all of the regulations' infirmities, so the Associations moved for—and were granted—a permanent injunction. Relevant here, the CEC was enjoined from implementing the information-disclosure provisions of § 1606, *id.* at 36a-39a; the marking provisions of § 1607, *id.* at 29a-35a; and various aspects of the § 1608 enforcement regime, *id.* at 40a-41a.

The district court properly recognized that § 1606's information-disclosure requirements force manufacturers to submit data to CEC that is, in the language of the preemption provision, "with respect to any measure of energy consumption or water use." 42 U.S.C. § 6297(a)(1). The court rejected CEC's argument that the term "disclosure of information" in § 6297 preempts only state requirements concerning information that is disclosed to consumers at the point of sale, *id.* at 36a-38a. Further, the district court held, § 1607's labeling obligations require manufacturers to include information on their products that federal regulations do not mandate, and therefore the regulation is preempted. *Id.* at 29a-32a.

2. On appeal, a divided panel of the Ninth Circuit reversed. After praising California's "laudable" regulatory regime, Pet. App. 2a, the court proceeded to employ a strong "presumption against preemption," *id.* at 4a. It determined that every

claim of preemption must be met with a "starting presumption that Congress did not intend to supplant state law" and that, accordingly, "express preemption statutory provisions should be given a narrow interpretation." *Id.* It then imposed a series of "narrow interpretation[s]" on the federal preemption provisions. With regard to information disclosure, its "narrow interpretation" of § 6297 caused it to interpret the term "disclosure of information" to encompass only "disclosure of information *on labels directed to consumers at point of sale or use*." *Id.* at 7a (emphasis added); see also *id.* at 8a-12a. Measuring § 1606 against these criteria, it held that the regulations are not preempted.

The court likewise determined that the federal preemption provisions are subject to a "narrow interpretation" with regard to California's labeling regulations. In service of its narrowing construction, it limited the capacious phrase "with respect to," and thereby determined that California's labeling requirements were not "with respect to any measure of energy consumption," Pet. App. 15a-16a (quoting 42 U.S.C. § 6297)—despite the fact that CEC had conceded as much before the district court. And, it went on to conclude, where Congress had authorized federal agencies to promulgate certain labeling standards but the agencies had not yet done so, California's own labeling requirements could not be preempted as "other than information required" under federal law. *Id.* at 17a-19a.

Judge Noonan dissented. He recognized that the court's responsibility in interpreting the statute was to employ "an exact reading of [the] broad term ['disclosure']." Accordingly, he began with the plain meaning of the phrase "disclosure of information," Pet. App. 21a (quoting *Webster's Third New International Dictionary* (3d ed. 1993)), and, on that basis, concluded that the term "disclosure" was "compendious," and that CEC's regulations are preempted. *Id.* at 21a-22a. He criticized the majority for its "[i]mpatience with the restraints imposed by the precise preemptive words of the statute," and

for "indulg[ing] idiosyncratic imagination" in its interpretation of the phrase "other than." *Id.* at 22a. And, finally, he recognized that the majority's application of a "presumption against preemption" was unwarranted. Thus, he suggested, this Court's reversal of the Ninth Circuit's decision in *EMA* "may be augury of what is to come." *Id.*

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *ENGINE MANUFACTURERS ASSOCIATION.*

Just two Terms ago, in *EMA*, eight Justices of this Court made it plain that an express preemption provision should be interpreted according to its text and structure, and that courts may not read artificial limitations into a statute that appear nowhere on its face—which is precisely what the court below did in this case. The lower court's approach in *EMA* was attacked by the United States in its amicus brief as harmful to the federal interests embodied in the Clean Air Act. The decision below in this case threatens manufacturers with just the sort of patchwork of state regulation that this Court deemed unacceptable in *EMA*, in accordance with the views of the Solicitor General. The result in this case harms manufacturers, and undermines the significant federal interest in uniformity embodied in 30 years of federal energy legislation.

1. In the decision below, the Ninth Circuit employed precisely the same interpretive methodology that it used in *EMA*, and that this Court rejected. Just as in *EMA*, the lower court began with a robust presumption against preemption. Pet. App. 4a & n.1.[10] With that presumption in hand, the court then applied a "narrow interpretation" to the federal preemption provision, § 6297. The phrase "narrow interpretation"

---

[10] As this petition demonstrates, the Ninth Circuit employed this presumption improperly and in conflict with decisions of this Court and other courts of appeals. *See infra* Section II.

and its variants appear *twelve times* in the majority opinion, see *id.* at 4a, 7a, 8a & n.5, 12a, 14a—an unmistakable indication that the court intended to constrict the statute's plain meaning. And, that is precisely what it did. The federal statute preempts "any State regulation [that] provides at any time for the disclosure of information with respect to any measure of energy consumption," if the regulation requires "testing," "the use of any measure of energy consumption," or "disclosure of information" "other than" that required by the federal statute. 42 U.S.C. § 6297(a)(1)(A), (B). Here, it is undisputed that the California regulations require manufacturers to provide information that the federal regime does not. When confronted with the statutory phrase "disclosure of information," however, the Ninth Circuit interpreted it to mean "only" "labeling directed to consumers at point of sale or use." Pet. App. 8a. Not all state regulations that require manufacturers to "disclose" information would be preempted, but rather only those that meet the Ninth Circuit's nontextual conditions.

As a threshold matter, this interpretation is a "radical reduction of the key statutory term[] '[d]isclosure,'" which assuredly has no built-in exception for divulgences to the government. Pet. App. 21a (Noonan, J., dissenting); see also *id.* ("Just as the meaning of 'disclose' is 'to expose to view' or 'to make known,' so the substantive noun referencing such an act is so extensive that it encompasses every compulsory revelation of the relevant information."); *Webster's Third New International Dictionary* 645 (3d ed. 1993) (defining "disclosure" broadly to include "the act or an instance of opening up to view, knowledge or comprehension"); *Black's Law Dictionary* 497 (8th ed. 2004) ("[t]he act or process of making known something that was previously unknown"). Nor does the distinction drawn by the Ninth Circuit make sense in any event, because CEC makes available to the public the information that it requires manufacturers to provide—

a fact that CEC itself touted to the Ninth Circuit. See Appellants' Opening Br. at 8-9.

2. Leaving aside these obvious errors, what is critical here—and what undeniably merits this Court's attention—is that the Ninth Circuit employed precisely the interpretive methodology in the decision below that this Court rejected in *EMA*. As in this case, the Ninth Circuit in *EMA* began by employing presumptions and narrowing constructions. *EMA*, 158 F. Supp. 2d 1107, 1111 (C.D. Cal. 2001), *aff'd*, 309 F.3d 550 (9th Cir. 2002) (per curiam).[11] It then concluded that a provision of the Clean Air Act, which forbids States from adopting or enforcing "*any* standard relating to the control of emissions from new motor vehicles," 42 U.S.C. § 7543(a) (emphasis added), did not preempt (as this Court characterized the argument) "standards imposed through purchase restrictions," 541 U.S. at 256. On review, by contrast, this Court began with the language of the statute, and interpreted the plain meaning of the text with reference to dictionaries. *Id.* at 252-53. Agreeing with the Solicitor General that the Ninth Circuit's interpretation was "untenable as a textual matter," Br. of United States at 24, *EMA*, 541 U.S. 246 (2004) (No. 02-1343), this Court roundly rejected the attempt to give the statute a "qualified meaning," because that qualification had "no basis in the text of the statute." 541 U.S. at 254, 255. The Court recognized that, because the plain text of the statute is "categorical," the statute admitted of no exceptions for certain subsets of "standards" favored by the state regulators (namely, "standards imposed through purchase restrictions"). *Id.* at 256.

EMA and the decision below are indistinguishable. In each case, the underlying statute employs a common English word that the statute did not define in specialized fashion: "standards" and "disclosure." In each case, the Ninth Circuit em-

[11] The Ninth Circuit issued an order adopting in whole the district court's "well-reasoned opinion," 309 F.3d at 551, so all citations are to the district court opinion.

ployed a nontextual limiting construction that preserved the "laudable" state regulation from preemption. In *EMA*, this Court granted certiorari to reverse the Ninth Circuit's mistaken limiting construction that did serious violence to important federal interests in uniform regulation. It should do the same here.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS REGARDING THE "PRESUMPTION AGAINST PREEMPTION."

The court of appeals' erroneous decision, and the resulting conflict with this Court's decision in *EMA*, resulted in large measure from its improper application of the so-called "presumption against preemption," which caused it to misconstrue the statute in an inappropriately narrow fashion. This Court has explained that the presumption is not appropriate in all situations, but the decision below ignored that admonition. And, in that regard, the decision below is not alone; at least two other circuits have applied the presumption in the same mistaken fashion (in contrast to at least five circuits that faithfully apply this Court's precedents). Accordingly, review is additionally warranted to address the conflict between the Ninth Circuit's decision and this Court's precedents, and to resolve the conflict among lower courts on this issue.

1. This Court has, in recent years, plainly and repeatedly made clear that the "presumption against presumption" applies *only* to subjects that States traditionally have occupied. See Pet. App. 22a (Noonan, J., dissenting) ("[The] presumption against preemption [is] only triggered by ... showing the field to be one traditionally occupied by the states."). In *Buckman Co.* v. *Plaintiffs Legal Committee*, the Court held that a question of preemption in "'a field which the States have traditionally occupied' ... warrant[s] a presumption against finding federal pre-emption of a state-law cause of action." 531 U.S. 341, 347 (2001) (citation omitted). But, because no such regulatory field was at issue in that case, "no

presumption against pre-emption obtains." *Id.* at 348. Other cases have held likewise. See, *e.g.*, *Bates* v. *Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law ...."); *United States* v. *Locke*, 529 U.S. 89, 107-08 (2000) ("'assumption' is triggered where 'the field which Congress is said to have pre-empted has been traditionally occupied by the States"); *De Buono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 n.8. (1997). In addition, the presumption does not apply "when the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108.

The Ninth Circuit's rule conflicts directly with these precedents. That court holds that the presumption *always* applies *unless* there is a "history of significant federal presence." Pet. App. 4a. This analysis turns the governing rule on its head: This Court's default rule is that the presumption does not apply, whereas the Ninth Circuit's default rule is that the presumption does apply. Although it is assuredly true that a history of federal regulation is a sufficient condition to assume preemption, see *Locke*, 529 U.S. at 108, it is just as certainly not a necessary condition, as the Ninth Circuit held. And, it is clear that this is the rule the lower court employed, because it made no effort to consider whether energy conservation is a traditional area of state regulation; rather, it simply reasoned that the presumption against preemption mandated a "narrow interpretation" of the federal statute. Pet. App. 4a.

Here, there is no tradition of state regulation that could justify butchering the plain meaning of Congress's express preemption provision. As noted above, the CEC was created in 1975—the same year EPCA was enacted—and in response to the same event (the Arab oil embargo). California did not require energy-efficiency information disclosure in any form until 1977, Pet. App. 2a, and most of the current requirements did not come until substantially later. The fact that one State began to regulate efficiency information concerning appli-

ances *after* the federal government did so hardly qualifies this as "'a field which the States have traditionally occupied.'" *Buckman*, 531 U.S. at 347. *EMA* demonstrates that such a limited history is not enough. There, the California governmental entity asserted that California's efforts to regulate motor vehicle emissions predated federal efforts by nearly a decade, but this Court saw no cause to apply a presumption against preemption. *A fortiori*, no presumption is applicable here, where federal and state regulation were, at most, contemporaneous. The rule announced by the Ninth Circuit, in short, directly conflicts with this Court's precedents, and the petition should accordingly be granted.

2. The need for review is all the more acute because there is a conflict among the federal courts of appeals over the circumstances in which a presumption against preemption should apply. The First, Second, Eighth, Eleventh and District of Columbia Circuits hold, consistent with this Court's precedents, that the presumption against preemption applies to a field in which there is a "significant" history of state regulation, or that is a "traditional" area of state regulation. See *UPS, Inc.* v. *Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003) (the presumption against preemption "only arises ... if Congress legislates in a field traditionally occupied by the states"); *Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 314 (2d Cir. 2005); *Forest Park II* v. *Hadley*, 336 F.3d 724, 731 (8th Cir. 2003) *Cliff* v. *Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125 (11th Cir. 2004); *Massachusetts* v. *United States Dep't of Transp.*, 93 F.3d 890, 894 (D.C. Cir. 1996); see also *Bronco Wine Co.* v. *Jolly*, 95 P.3d 422, 429 (Cal. 2004), *cert. denied*, 125 S. Ct. 1646 (2005).

In conflict with this rule, the Fourth and Seventh Circuits have adopted the broader formulation of the Ninth Circuit, and treat a presumption against preemption as the default rule. See *Pinney* v. *Nokia, Inc.*, 402 F.3d 430, 453 (4th Cir. 2005), *petitions for cert. filed*, 74 U.S.L.W. 3108, 3114 (U.S. Aug. 10, 2005) (Nos. 05-198, 05-207); *College Loan Corp.* v. *SLM*

Corp., 396 F.3d 588, 597 (4th Cir. 2005); *Frank Bros., Inc.* v. *Wisconsin Dep't of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) ("we presume that, *in all circumstances*, 'Congress does not intend to supplant state law'" (emphasis added)). As this case shows, preemption will often turn on whether the court attempts to apply the ordinary meaning of the statute, or an artificially narrow one. Accordingly, the starting point is outcome determinative, and a conflict among the circuits on such a fundamental issue of federal supremacy warrants this Court's review.

3. Having mistakenly applied the presumption against preemption, the Ninth Circuit believed that it should therefore employ a "narrow interpretation" of the federal preemption provisions, which in turn led to multiple errors in the decision below. As noted above, the lower court interpreted the term "disclosure of information," as it applies to § 1606's disclosure provisions, in a mistakenly narrow fashion. See *supra* Section I. It did likewise with regard to the marking requirements contained in § 1607 of the California regulations.

Section 6297 preempts state regulations that require a "disclosure of information" that is "*with respect to* any measure of energy consumption or water use of any covered product," 42 U.S.C. § 6297(a)(1) (emphasis added), if the disclosure of information is not required by the federal statute, *id.* § 6297(a)(1)(B). The linchpin here is the phrase "with respect to." The statute does not merely preempt "measure[s] of energy consumption or water use"—it also preempts any regulation that is "with respect to" such a measure. The phrase "with respect to" by its nature indicates the expansive preemptive scope of the provision. This Court repeatedly has held that modifiers like this one indicate a "broad pre-emptive purpose." See, *e.g.*, *Morales* v. *Trans World Airlines*, 504 U.S. 374, 383-84 (1992) (interpreting the phrase "related to" in ERISA).

The information that must be included on product labels pursuant to California marking requirements is assuredly

"*with respect to* any measure of energy consumption." Section 1607 of the California regulations requires manufacturers to include on the label its name, brand name or trademark; the appliance's model number; and the date of manufacture. Cal. Code Regs. tit. 20, § 1607(b)(1)-(3). The very purpose of this regulation is to govern measures of energy consumption. The regulation appears within the title of the California Code of Regulations devoted to "Public Utilities and Energy"; in a division of that title entitled "State Energy Resources Conservation and Development Commission"; in an article named "Appliance Efficiency Regulations"; and the self-evident purpose of these labeling requirements is to assist in making determinations about the product's compliance with energy consumption standards. Indeed, CEC conceded as much in the district court. Tr. of 12/05/2002 Hr'g on Mot. for Prelim. Inj., at 41-42.

The Ninth Circuit, however, failed to accord this phrase its common and broadly preemptive meaning. That court showed no recognition of the breadth of the phrase. It cited *Egelhoff* and *Travelers*, in which this Court reaffirmed that "relates to" preemption is "clearly expansive," but it made no mention of that holding. Pet. App. 15a; see *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001); *New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Instead, the lower court employed only the language from those cases stating that there must be some outer limit on the term "relates to." See, *e.g.*, *Egelhoff*, 532 U.S. at 146 ("the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy'"); see Pet. App. 15a.

This is of course true, but it hardly means—as the Ninth Circuit interpreted it—that the preemptive phrase must be "narrowly interpreted." On the contrary, *Egelhoff* recognizes that a broadly framed term like "relates to" preempts everything that "'has a connection with or reference to'" the preempted field. 532 U.S. at 147. And, the labeling require-

ments of § 1607(d)(2) surely have "a connection with" "measure[s] of energy consumption." They are not "generally applicable laws regulating 'areas where [the federal statute] has nothing to say,'" *id.* at 147-48; they are instituted for the very purpose of supplementing the federal regulations. Moreover, by imposing requirements that the federal statute and regulations do not, the California regulations "interfere[] with nationally uniform" labeling, and "subject [manufacturers] to different legal obligations in different States." *Id.* at 148. In short, the lower court's mistaken use of the presumption against preemption led it to a result that is directly contrary to the system of national uniformity that Congress envisioned.

The decision below was similarly mistaken in its interpretation of § 1607(d)(2), and its error again seems rooted in the court's "narrow interpretation" of the statute. Section 1607(d)(2) of the California regulations requires manufacturers of specified products to label the products with "energy performance information." The Ninth Circuit reasoned that because § 6297 preempts only "disclosure of information" that is "other than information required under" the federal statute, 42 U.S.C. § 6297(a)(1)(B), and because no federal regulation yet governs disclosure of this information, this requirement is not "other than" a federal requirement.

This interpretation simply makes no sense unless the sole purpose of the interpretive exercise is to preserve state law. Because the federal regulations do not yet require any information to be disclosed, the state requirement of course mandates a "disclosure of information" that is "*other than* information required under" the federal scheme. As Judge Noonan recognized in dissent:

> Where there are no federal regulations on the subject because the DOE has not promulgated any regulations, then any state regulations are "other than" those federally required. The court indulges idiosyncratic imagination in supposing that there must be federal regulations

> in existence for "other than" to apply. Au contraire, if nothing exists, any state regulations are other than what exists as federal regulation. The fundamental tenet of express preemption is that Congress may preclude state involvement, even where it chooses not to regulate. Through its misreading of "other than" the court has imposed a heightened burden on the manufacturers to show implied preemption, despite Congress' express statement of preemption.

Pet. App. 22a. If California thinks that the Department of Energy has an obligation to adopt labeling requirements, the appropriate response is not to plow ahead with regulations of its own in violation of the statutory preemption provision; rather, it may seek to compel the Department of Energy to adopt regulations by using the citizen-suit provision created by Congress. See 42 U.S.C. § 6305(a)(2).[12]

The Ninth Circuit's contrary, anti-preemption interpretation of "other than" would lead to a race to regulate. Any State that regulated in advance of the federal government would, as a practical matter, be able to force manufacturers to comply on a national basis with that State's regulatory desires. Even if such state regulations later were preempted by subsequent federal regulations, the very harms Congress sought to prevent would already have occurred. See S. Rep. No. 100-6, at 4 (1987), *reprinted in* 1987 U.S.C.C.A.N. at 54-55 (absent federal preemption, "[r]egulations in a few populous States could as a practical matter determine the product lines sold nationwide, even in States where no regulations existed"). [13]

---

[12] CEC is well aware of this provision, having just employed it in an effort to force the Department of Energy to issue energy efficiency standards. See Complaint, *State of New York* v. *Bodman*, No. 05-CV-7807 (S.D.N.Y. filed Sept. 7, 2005).

[13] The Ninth Circuit's interpretation finds no support in *Puerto Rico Department of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988); see Pet. App. 18a (relying on same). That case, unlike this one, dealt with the decidedly "untypical claim" that preemption existed despite

This only confirms that the court below was mistaken in applying its "narrow interpretation" to the federal preemption provisions.

* * * *

Whether and when to apply the presumption against preemption is an important issue of federal law, as it implicates important issues of federal power and of federalism. Were the Fourth, Seventh and Ninth Circuits correct in their application of the presumption, it would mean that other courts of appeals are preempting state law too readily, and therefore improperly trenching on state power. But the Ninth Circuit and its colleagues are incorrect (as this Court and at least five courts of appeals have held) and therefore the danger is quite a different one—namely, that important federal interests, including in uniformity of national policy, are being thwarted. As the following section demonstrates, that is precisely what has happened in the critical realm of national energy policy, which reinforces the need for this Court's review.

III. THE DECISION BELOW, IN UNDERMINING FEDERAL UNIFORMITY, IMPLICATES IMPORTANT FEDERAL INTERESTS AND IMPOSES GREAT HARM ON NATIONAL MANUFACTURERS.

In addition to the conflicts set forth above, this case further merits review because it implicates important federal interests, and because it has practical consequences for manufacturers and for the system of uniformity that Congress sought to impose.

1. Congress has made unmistakably clear that it views energy efficiency to be a matter of surpassing federal impor-

---

the fact that "Congress ha[d] withdrawn from all substantial involvement in" the relevant field. 485 U.S. at 500, 504. There, the claim of preemption was based on "nothing more than excerpts from ... legislative history," *id.* at 501; here, preemption is mandated by a broadly phrased express preemption provision.

tance. As set forth above, this is plain from Congress's enactment of express preemption provisions in §§ 6297 and 6316; from the implementation of expansive statutory and regulatory regimes by Congress, the Department of Energy and the Federal Trade Commission; and from the safety valve established by § 6297(d), which expressly favors national interests over state ones. See 42 U.S.C. § 6297(d)(3) (providing that the safety valve is unavailable if "State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing ... *on a national basis*" (emphasis added)).

The national importance of the issue is likewise clear from Congress's repeated statements on the subject. When Congress enacted EPCA in 1975, it recognized that the "nation has entered a new era" regarding energy supply, which "underscored ... the need for policy decisions at the national level." H.R. Rep. No. 94-340, at 1 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1763. In fact, Congress treated energy policy as a matter of foreign policy and "national security," *id.* at 4, 1975 U.S.C.C.A.N. at 1766; S. Conf. Rep. No. 94-516, at 117, 1975 U.S.C.C.A.N. at 1957, which are quintessentially matters of national concern. With each new enactment concerning energy efficiency, Congress has reiterated the national importance of energy policy. See, *e.g.*, H.R. Rep. No. 94-340, at 2, 1975 U.S.C.C.A.N. at 1763 (section setting forth "requirements for a national energy policy" (capitalization omitted)); H.R. Rep. No. 100-11, at 26 ("Appliance efficiency has been a subject of national interest since at least the initial energy price jolts of the early 1970's."); S. Rep. No. 100-6, at 2, 1987 U.S.C.C.A.N. at 52 (one purpose of NAECA is "to reduce the regulatory and economic burdens on the appliance manufacturing industry through the establishment of *national* energy conservation standards" (emphasis added)). In short, this is a matter of *national* policy to which Congress has crafted a *national* response, which is, after all, precisely the meaning and purpose of a preemption provision.

2. What is more, it is plain from the record in this case that the California regulations will cause the exact harms that Congress sought to avoid when it enacted §§ 6297 and 6316. In national energy statutes, Congress struck a balance between increased federal regulation and a "patchwork" of state regulation that would impose massive regulatory burdens on manufacturers. The California regulations at issue totally upset that balance by imposing the sort of burdens that Congress meant to preempt.

First, the information-disclosure requirements will impose significant costs because they require manufacturers to disclose—and therefore to collect—data that is not otherwise generated by federally mandated testing procedures.[14] The record reflects, for instance, that certain manufacturers will have to build expensive test models in order to perform the tests and compile the data that the regulations require; others will have to purchase new labeling equipment and software. One company estimates its resulting compliance costs at over $3 million; others have estimated their costs of building test models in the hundreds of thousands of dollars. Even for manufacturers that do not anticipate building new test models, to perform the newly required testing will itself be extremely costly—again, in the hundreds of thousands of dollars for certain manufacturers.[15] The process will in any event be burdensome; manufacturers of air-conditioning units will, for instance, be required to test for, gather and calculate numerous additional types of data.[16]

---

[14] *See, e.g.*, Decl. of Dr. Karim Amrane at 2-4; Decl. of James T. VerShaw at 5-6. Each of these declarations, as well as those in the footnotes that follow, was filed in support of the Associations' motion for a preliminary injunction.

[15] *See, e.g.*, Decl. of Frank Myers at 2-3; Decl. of Jim C. Smelcer at 2-3; Decl. of Robert J. Rasp at 2; Decl. of William T. Harrigill at 3; Decl. of Dr. Mark Hogan at 5; Decl. of Charles W. Adams at 3;

[16] *See, e.g.*, Decl. of Daniel J. Arnold at 4; Decl. of Fred J. Keller at 4; *cf. also* declarations cited *supra* note 14.

The labeling requirements of § 1607 are similarly burdensome. The CEC regulations would require many manufacturers to purchase new labeling equipment, or to retool or reprogram their existing equipment. Numerous manufacturers would incur costs in the tens or hundreds of thousands of dollars; some would incur costs in this range *per year*; and others would incur ultimate costs in the millions of dollars.[17] And, it must be noted, at least some of the California requirements serve no obvious conservation purpose—they would require substantial expense, for instance, to print the date of manufacture (which already appears on product labels) in a new, California-mandated format.

The impact of all of these requirements is exacerbated by the § 1608 enforcement mechanism. Under that provision, no product may be sold in California unless it meets the requirements of § 1606 and § 1607. Given the size of the California economy, the § 1608 enforcement mechanism ensures that every product produced for sale anywhere in the United States must meet the CEC standards, because manufacturers do not know whether a given product will eventually be distributed to California. Congress expressly recognized this prospect when it enacted NAECA, and intended to prevent it.

* * * *

California's agency sought to achieve the same result in *EMA*—imposing requirements on an entire industry—that CEC seeks to accomplish here, and this Court granted review to protect national interests and those of the other 49 States. It should do so here as well. If California wants to impose requirements, the statute has a mechanism, 42 U.S.C. § 6297(d), but California has not used that safety valve. Instead, it seeks to impose its will unilaterally on all appliance

---

[17] *See, e.g.*, Decl. of Howard Wolfman at 2; Decl. of Robert B. Boteler at 2; Decl. of Joseph G. Howley, Jr. at 2; Decl. of Daniel J. Canclini at 2; Decl. of Irvin L. Derks at 2; Decl. of James T. VerShaw at 4; Decl. of Francis L. Franck at 3; Decl. of Robert J. Rasp at 3.

manufacturers. That is a situation that only this Court can correct, and it should grant review to do so.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STEPHEN R. YUREK
GENERAL COUNSEL
VICE PRESIDENT, POLICY & PUBLIC AFFAIRS
AIR-CONDITIONING & REFRIGERATION INSTITUTE
4100 North Fairfax Drive
Suite 200
Arlington, VA 22203
(703) 524-8800

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
ERIC A. SHUMSKY
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JOSEPH M. MATTINGLY
VICE PRESIDENT, SECRETARY AND GENERAL COUNSEL
GAS APPLIANCE MANUFACTURERS ASSOCIATION, INC.
1207 Wilson Blvd
Suite 600
Arlington, VA 22201
(703) 525-7060

CHARLES A. SAMUELS
GENERAL COUNSEL
ASSOCIATION OF HOME APPLIANCE MANUFACTURERS
MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO PC
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

CLARK REID SILCOX
COUNSEL
NATIONAL ELECTRICAL
MANUFACTURERS
ASSOCIATION
1300 North 17th Street
Suite 1847
Rosslyn, VA 22209
(703) 841-3200

JOHN A. HODGES
BRUCE L. MCDONALD
PETER J. RIEHM
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Petitioners
September 12, 2005 * Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT.

No. 03-16621

AIR CONDITIONING AND REFRIGERATION INSTITUTE; GAS APPLIANCE MANUFACTURERS ASSOCIATION; ASSOCIATION OF HOME APPLIANCE MANUFACTURERS; NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Plaintiffs-Appellees,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION; WILLIAM J. KEESE, Chairman; ROBERT PERNELL, Commissioner; AURTHUR H. ROSENFELD, Commissioner; JAMES D. BOYD, Commissioner; JOHN L. GEESMAN, Commissioner,

Defendants-Appellants.

Argued and Submitted Nov. 1, 2004
Opinion Filed Feb. 3, 2005
Amended June 3, 2005

Appeal from the United States District Court for the Eastern District of California; William B. Shubb, Chief Judge, Presiding. D.C. No. CV-02-02437-WBS/PAN.

Before: B. FLETCHER, NOONAN, and THOMAS, *Circuit Judges*.

AMENDED OPINION

THOMAS, *Circuit Judge*.

This case presents the question of whether federal law preempts California's appliance regulations requiring appli-

ance manufacturers to submit data about their appliances to California's Energy Resources Conservation and Development Commission ("Commission"), mark their appliances with basic information such as brand name and energy performance, and be subjected to related compliance and enforcement rules. We conclude that federal law does not preempt California's regulations. We therefore reverse the district court's decision finding the regulations preempted and permanently enjoining the Commission from enforcing these regulations, vacate the injunction, and remand.

I

California boasts an extensive and laudable appliance efficiency program. As part of California's program, the Commission has, since 1977, required manufacturers to submit data to it. The data collected by the Commission pursuant to section 1606 of Title 20 of the California Code of Regulations is maintained in an electronic database, which contains information on over 135,000 appliance models. The Commission's database provided the foundation of information for the Environmental Protection Agency's Energy Star program and is used frequently by consumers, energy consultants, contractors, researchers, utility program managers, manufacturers, and other governmental agencies. As part of California's appliance program, the Commission also requires manufacturers to put basic information—such as the manufacturer's brand name and the appliance's size and energy performance—on their appliances. Cal.Code Regs. tit. 20, § 1607(b)-(d)(2). The Commission enforces the data submittal and marking requirements it places on manufacturers under section 1608. Cal.Code Regs. tit. 20, § 1608.

Plaintiffs-Appellees, four major trade organizations representing appliance manufacturers nationwide ("Trade Associations"), claim that these California regulations are preempted by the Energy Policy and Conservation Act, Pub. Law No. 94-163, 89 Stat. 871 (1975) ("EPCA"), specifically by 42

U.S.C. §§ 6297(a) and 6316(a)-(b). After these regulations were adopted but before they went into effect, Trade Associations filed suit for declaratory and injunctive relief in the United States District Court for the Eastern District of California. The district court held that the California regulations are preempted. The court, first preliminarily and then permanently, enjoined the Commission from enforcing the regulations. The Commission timely appealed.

We review the district court's decision regarding preemption *de novo*, *Chamber of Commerce v. Lockyer*, 364 F.3d 1154, 1160 (9th Cir.2004), and the district court's grant of permanent injunction for abuse of discretion, *Ting v. AT & T*, 319 F.3d 1126, 1134-35 (9th Cir.2003).

II

Preemption can occur in one of three ways: express preemption by statute, occupation of the field, or conflict between state and federal regulation. *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). All parties agree that this case presents a question of express preemption. Thus, this case boils down to the interpretation of the statutory provision that allegedly preempts state law. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

To determine whether California's regulations are preempted by EPCA, we are instructed to first "'identify the domain expressly pre-empted' by that language." *Medtronic*, 518 U.S. at 484, 116 S.Ct. 2240 (quoting *Cipollone*, 505 U.S. at 517, 112 S.Ct. 2608). "Since pre-emption claims turn on Congress's intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." *New York State*

Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) (internal citations omitted).

Our interpretation of the federal statute is informed by two presumptions about the nature of preemption. *Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240. First, we address claims of preemption with the starting presumption that Congress did not intend to supplant state law. *Id.* Where, as is the case here, the State regulates in an area where there is no history of significant federal presence, *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000),[1] we assume that the "historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). This presumption against preemption leads us to the principle that express preemption statutory provisions should be given a narrow interpretation. *Id.*; *Cipollone*, 505 U.S. at 518, 112 S.Ct. 2608.

Second, our analysis of the scope of the statute's preemption is guided by the Supreme Court's oft-stated com-

---

[1] *Compare infra* Part III.A (discussing legislative history of EPCA), *with Locke*, 529 U.S. at 108, 120 S.Ct. 1135 (finding the presumption against preemption does not apply where the federal interest in the area the State enacted legislation in, interstate navigation, "has been manifest since the beginning of our Republic"), *and Ting*, 319 F.3d at 1136 (finding that the presumption against preemption does not apply "because of the long history of federal presence in regulating long-distance telecommunications"), *and Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir.2002) (finding that the presumption against preemption does not apply because of the history of significant federal presence in national banking), *and Skysign Int'l, Inc. v. City & County of Honolulu*, 276 F.3d 1109, (9th Cir.2002) (finding that presumption against preemption does not apply where aerial signage ordinance specifically targeted navigable airspace, an area where there is a history of significant federal presence).

ment that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240 (internal quotations marks omitted). "As a result, any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of congressional purpose.'" *Id.* at 485-86, 116 S.Ct. 2240 (quoting *Cipollone*, 505 U.S. at 530, n. 27, 112 S.Ct. 2608) (emphasis omitted).

Also relevant to our interpretation of the scope of the statute's preemption are the "structure and purpose of the statute as a whole, as revealed not only in the text, but through [our] reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 486, 116 S.Ct. 2240 (internal citation and quotation marks omitted).

III

Thus, we turn to the language of the express preemption provision at issue. 42 U.S.C. § 6297[2] provides, in relevant part:

> (a) Preemption of testing and labeling requirements
>
> (1) Effective on March 17, 1987, this part supersedes any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if—
>
> (A) such State regulation requires testing or the use of any measure of energy consumption, water use, or

---

[2] 42 U.S.C. § 6316(a)-(b), the other preemption provision at issue in this case, incorporates § 6297(a) with a few subtle distinctions that are not relevant to this case. 42 U.S.C. § 6316(a)-(b) relates to commercial and industrial appliances whereas § 6297(a) relates to residential appliances. Hereinafter, when we refer to 42 U.S.C. § 6297(a), in doing so, we also refer to § 6316(a)-(b).

> energy descriptor in any manner other than that provided under section 6293[3] of this title; or
>
> (B) such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294[4] of this title.

42 U.S.C. § 6297.

A. Data Submittal Regulation

The first California regulation that 42 U.S.C. § 6297(a) arguably preempts is Cal.Code Regs. tit. 20, § 1606, which requires appliance manufacturers to submit specified information to the Commission for each appliance for sale or sold in California. Such information includes the name of the manufacturer, the brand name, the model number, and data produced during tests the manufacturer is required to perform under Cal.Code Regs. tit. 20, § 1604. *See* Cal.Code Regs. tit. 20, §§ 1606(a), Table U.

To determine whether 42 U.S.C. § 6297(a) preempts the data submittal requirements of Cal.Code Regs. tit. 20, § 1606, we look to the text of § 6297(a). Section 6297(a) preempts any state regulation that provides "at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if . . . such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294." The district court found the text of § 6297(a), in particular the meaning of the phrase "disclosure of information," ambiguous, and so do we.

---

[3] 42 U.S.C. § 6293 establishes federal appliance testing requirements.

[4] 42 U.S.C. § 6294 establishes federal appliance labeling requirements.

Beginning with the presumption that Congress did not intend to supplant state law, we must narrowly interpret § 6297(a) in general, and the phrase "disclosure of information" in particular. *See Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240. A narrow interpretation is consistent with our direction to find preemption when preemption is the "clear and manifest purpose of Congress." *Id.* The narrow interpretation the Commission advances is supported by the statutory text and is consistent with Congress's purpose. Applying a narrow interpretation of § 6297(a), we hold that it does not preempt the data submittal requirements contained in Cal.Code Regs. tit. 20, § 1606.

The rules of statutory construction support the narrow interpretation of "disclosure of information." One rule of statutory construction is that "identical words used in different parts of the same act are intended to have the same meaning." *Commissioner of Internal Revenue v. Lundy*, 516 U.S. 235, 250, 116 S.Ct. 647, 133 L.Ed.2d 611 (internal citations and quotation marks omitted). The phrase "disclosure of information" is used twice in § 6297(a)(1) and should be given the same meaning in both instances. In § 6297(a)(1), "disclosure of information" concerns information with respect to any measure of energy consumption or water use. In § 6297(a)(1)(B), "disclosure of information" requires manufacturers to place certain information on consumer-directed product labels, as required by 42 U.S.C. § 6294. *See* 42 U.S.C. § 6294. In both instances, "disclosure of information" may be interpreted to generally refer to the disclosure of information on labels directed to consumers at point of sale or use. Thus, a narrow interpretation of § 6297 (a)(1) is supported by the statutory text, and this interpretation should be applied.

Furthermore, the statute as a whole compels a narrow interpretation of "disclosure of information." Congress did not use the phrase "disclosure of information" in EPCA when

it referenced manufacturers providing data to the Department of Energy ("DOE"); instead, Congress used the phrase "submit information or reports." 42 U.S.C. § 6296(d). 42 U.S.C. § 6296(d) allows the DOE to require appliance manufacturers to provide the DOE with information about energy efficiency.

42 U.S.C. § 6296(d) provides, in relevant part, "the Secretary may require . . . each manufacturer of a covered product to *submit information or reports* to the Secretary." *Id.* § 6296(d)(1) (emphasis added). When Congress referred to the submittal of data to a government entity in EPCA, it used the phrase "submit information or reports," not "disclosure of information." The statute as a whole does not support a broad interpretation of "disclosure of information." On the contrary, it suggests that "disclosure of information" only pertains to labeling directed to consumers at point of sale or use.[5]

In addition, the narrow interpretation of "disclosure of information" rests on "a fair understanding of congressional purpose" as evidenced by the relevant legislative history.

---

[5] The narrow interpretation of the phrase "disclosure of information" is also supported by the relevant FTC regulations. 16 C.F.R. Part 305 establishes regulations regarding the consumer-directed labeling of appliances and the testing required to accurately label appliances. 16 C.F.R. pt. 305. Part 305 also includes regulations pertaining to the form and content of the labels, §§ 305.11-.14, and the testing manufacturers must perform in order to label with information regarding their appliances' energy efficiency or use, §§ 305.5-.10. The sections pertaining to the form and contents of the labels are clustered under the heading of "Required Disclosures." Section 305.8, which requires manufacturers to submit annually to the FTC a report listing the annual energy consumption or energy efficiency rating for each basic model in current production, is titled "Submission of data." The FTC regulations use "disclosure" to refer to consumer-directed labeling and "submission" to refer to data-submittal to a government entity. Therefore, the FTC regulations, like EPCA, use "disclosure" to refer to consumer-directed labeling and "submission" or "submit" to refer to data-submittal to the government.

Medtronic, 518 U.S. at 485-86, 116 S.Ct. 2240 (quoting *Cipollone*, 505 U.S. at 530, n. 27, 112 S.Ct. 2608) (internal quotation marks and emphasis omitted). The original version of the current labeling and testing pre-emption provision was first enacted in the EPCA, Pub. Law No. 94-163, 89 Stat. 871 (1975). Its purpose appears to be unchanged since then.

Congress enacted EPCA in 1975, in the aftermath of the oil embargo imposed against the United States by certain countries in the years prior. *Natural Res. Def. Council v. Herrington*, 768 F.2d 1355, 1364 (D.C.Cir.1985). The oil embargo called attention to the serious economic and national security problems associated with our nation's continued reliance on foreign energy resources. *Id.* In response, President Ford called for "the strongest and most far-reaching energy conservation program we have ever had." *Id.* (quoting 11 Weekly Comp. Pres. Doc. 40, 41 (Jan. 20, 1975)) (internal quotation marks omitted). Subsequently, Congress enacted EPCA, and in doing so, established a comprehensive energy policy. *Id.*

EPCA was designed, in part, to reduce the United States' "domestic energy consumption through the operation of specific voluntary and mandatory energy conservation programs." S.Rep. No. 94-516, at 117 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957. Part of EPCA's energy conservation program was to "[r]equire energy labeling of major home appliances and certain other consumer products, and authorize energy efficiency standards for major appliances." *Id.* at 118. Congress believed that better informed consumers and voluntary efforts by manufacturers would make energy efficiency standards unnecessary. H. Rep. No. 94-340, at 95 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1857. Therefore, Congress required manufacturers to label their appliances and provided that the Secretary of the Federal Energy Administration should utilize energy efficiency standards if the labeling program proved ineffective. *Id.* at

99. As a result, EPCA's express preemption provisions dealt primarily with the possibility that states would adopt different test procedures or consumer labeling requirements. *See* Pub. Law No. 94-163, § 327, 89 Stat. 871, 926-27. EPCA preempted state regulations insofar as they were "other than" the applicable federal rules for testing and labeling. *Id.* § 327(a)(1), 89 Stat. at 927. EPCA, however, allowed state regulations that differed from the federal regulations if the state regulations were justified by a substantial state or local need, did not interfere with interstate commerce, and were more stringent than the federal standard. *Id.* § 327(b)(2), 89 Stat. at 927.

The National Energy Conservation and Policy Act, Pub.L. No. 95-619, 92 Stat. 3206 (1978) ("NECPA"), amended portions of EPCA's preemption provisions. States were still allowed to adopt regulations identical to federal regulations. *See* EPCA § 327(a)(2), 89 Stat. at 927. States were allowed to prescribe regulations more stringent than federal regulations—or, if there was no federal regulation, a state could implement its own standard—*only* if the Secretary found there was a significant state or local interest to justify the state's regulation and the regulation would not unduly burden interstate commerce. NECPA § 424(a), 92 Stat. at 3264. NECPA did not amend EPCA's preemption provisions regarding testing or labeling. *Id.*

On a larger scale, NECPA created a nationwide conservation program for appliances and required the DOE to prescribe minimum energy efficiency standards for thirteen covered products. *Herrington*, 768 F.2d at 1367; *see* H.R.Rep. No. 95-1751, at 114 15 (1978). However, instead of adopting energy efficiency standards, the DOE concluded in 1982 that establishing minimum energy efficiency standards for the relevant appliances would not result in significant energy conservation and would not be economically justified. H.R.Rep. No. 100-11, at 27. Thus, the DOE

determined no efficiency standards were required under NECPA. *Id.* "While DOE adopted its policy of the 'no-standard' standards, it also initiated a general policy of granting petitions from States requesting waivers from preemption. As a result, a system of separate State appliance standards ha[d] begun to emerge and the trend [was] growing." S.Rep. No. 100-6, at 4. The D.C. Circuit held that the DOE erroneously concluded that "nostandard" standards was appropriate and instructed the DOE to adopt federal efficiency standards. *Herrington*, 768 F.2d at 1433.

Because the DOE could not establish federal appliance efficiency standards immediately, major manufacturer trade associations and the Natural Resources Defense Council negotiated a compromise solution, which Congress enacted as the National Appliance Energy Conservation Act of 1987, Pub.L. No. 100-12, 101 Stat. 103 (1987) ("NAECA"), codified at 42 U.S.C. §§ 6291-6309. H.R.Rep. No. 100-11, at 27-28; S.Rep. No. 100-6, at 4-5, *reprinted in* 1987 U.S.C.C.A.N. 52, 54-55. NAECA established federal energy efficiency standards for residential appliances; DOE action was not required to set these standards. NAECA § 5, 101 Stat. at 107-17.

NAECA also amended NECPA's preemption provisions. NAECA provided that states could no longer adopt energy efficiency standards that were identical to the federal standards. 42 U.S.C. § 6297(c). NAECA also made it more difficult for states to obtain waivers of preemption for more stringent state efficiency standards; in order to obtain a waiver, NAECA required states to establish by a preponderance of the evidence that state regulation was justified by unusual and compelling state or local interests. 42 U.S.C. § 6297(d)(1)(B)-(C); *see* S.Rep. No. 100-6, at 9. The reason for the broader preemption standards was to counteract the systems of separate state appliance standards that had emerged as a result of the DOE's "general policy of granting

petitions from States requesting waivers from preemption," which caused appliance manufacturers to be confronted with "a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans." S.Rep. No. 100-6, at 4. As for the preemption provisions regarding testing and labeling, NAECA, "essentially restate[d] existing law, and provide[d] that the Act supersedes State and local regulations regarding testing and labeling in certain cases." *Id.* at 9.

The latest legislation amending EPCA is the Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776 (1992) ("EPAct"), codified at 42 U.S.C. §§ 6311-17, which expanded the federal appliance program to include energy efficiency standards for commercial and industrial appliances. 42 U.S.C. §§ 6295(j)-(k), 6313. EPAct incorporated the preemption provisions of 42 U.S.C. § 6297, with a few subtle distinctions, which are not relevant to this case. 42 U.S.C. § 6316(a)-(b). EPAct's legislative history is silent on preemption.

In sum, the legislative history of the relevant Acts supports a narrow interpretation of the preemption provision. There is no indication that Congress, in the preemption provision of EPCA as amended by subsequent Acts, intended to preempt state regulations requiring the submission of data to state government agencies. The legislative history instead demonstrates that Congress intended to preempt state energy efficiency standards, testing procedures, and consumer labeling requirements. We therefore conclude that because "disclosure of information" only refers to consumer-directed labeling at point of sale or use, Cal.Code Regs. tit. 20, § 1606 is not preempted by 42 U.S.C. § 6297(a)(1).[6]

---

[6] We also hold that Cal.Code Regs. tit. 20, § 1606 is not preempted by 42 U.S.C. § 6316(a)-(b), which is substantively the same as § 6297(a)(1).

B. Marking Regulations

The second set of California's regulations the Trade Associations argue is preempted by federal law are the appliance-marking requirements of sections 1607(b), (c), (d)(1), and (d)(2) of Title 20 of the California Code of Regulations.

Section 1607(b)[7] and (c)[8] of Title 20 of the California Code of Regulations—which require appliances to be labeled with the manufacturer's name, brand name, or trademark; the appliance's model number; and date of manufacture—are not preempted by federal law because the subsections do not "provide[ ] at any time for the disclosure of information with respect to any measure of energy consumption or water use of

---

[7] Cal.Code Regs. tit. 20, § 1607(b) provides:

> Except as provided in subsection (c), the following information shall be permanently, legibly, and conspicuously displayed on an accessible place on each unit;
>
> (1) manufacturer's name or brand name or trademark;
>
> (2) model number; and
>
> (3) date of manufacture, indicating (i) year and (ii) month or smaller (e.g.week) increment. If the date is in a code that is not readily understandable to the layperson, the manufacturer shall immediately, on request, provide the code to the Energy Commission.

Id. § 1607(b).

[8] Cal.Code Regs. tit. 20, § 1607(c), titled "Exceptions to Subsection (b)," provides, in relevant part:

> (1) For plumbing fixtures and plumbing fittings, the information required by subsection (b) shall be permanently, legibly, and conspicuously displayed on an accessible place on each unit or on the unit's packaging.
>
> (2) For lamps, the information required by subsection (b) shall be permanently, legibly, and conspicuously displayed on an accessible place on each unit, on the unit's packaging, or, where the unit is contained in a group of several units in a single package, on the packaging of the group.

Id. § 1607(c).

any covered product." 42 U.S.C. § 6297(a)(1).[9] The information required to be placed on appliances under section 1607(b) and (c) is not "information with respect to any measure of energy consumption or water use" unless one expansively interprets "with respect to" and "measure of energy consumption," 42 U.S.C. § 6297(a)(1). In accordance with the presumptions informing our interpretation of express preemption provisions, we interpret these terms narrowly as such an interpretation is consistent with the statutory text.

"Measure of energy consumption" is defined as "energy use, energy efficiency, estimated annual operating cost, *or other measure of energy consumption.*" 42 U.S.C. § 6291(8) (emphasis added). We decline to interpret "other measure of energy consumption," the only relevant term left undefined in the statute, so broadly that it encompasses the information required to be placed on appliances under California's sections 1607(b) and (c). Under the maxim of statutory interpretation known as *ejusdem generis*, "or other measure of energy consumption" embraces only objects similar in nature to those enumerated by the preceding specific words. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001). "Or other measure of energy

---

[9] "Measure of energy consumption" is defined as "energy use, energy efficiency, estimated annual operating cost, or other measure of energy consumption." 42 U.S.C. § 6291(8). "Energy use" is defined as "the quantity of energy directly consumed by a consumer product at point of use . . . ." *Id.* § 6291(4). "Energy efficiency" is defined as "the ratio of the useful output of services from a consumer product to the energy use of such product . . . ." *Id.* § 6291(5). "Estimated annual operating cost" is defined as "the aggregate retail cost of the energy which is likely to be consumed annually, and in the case of showerheads, faucets, water closets, and urinals, the aggregate retail cost of water and wastewater treatment services likely to be incurred annually, in representative use of a consumer product . . . ." *Id.* § 6291(7). "Water use" is defined as "the quantity of water flowing through a showerhead, faucet, water closet, or urinal at point of use . . . ." *Id.* § 6291(31)(A).

consumption" must be construed to give effect to the terms preceding the phrase and must be defined by reference to the terms preceding it. *Id.* at 115, 121 S.Ct. 1302. Therefore, "or other measure of energy consumption" does not broaden the meaning of "measure of energy consumption," which is defined, in part, as: "the quantity of energy directly consumed by a consumer product at point of use," 42 U.S.C. § 6291(4); "the ratio of the useful output of services from a consumer product to the energy use of such product," *id.* § 6291(5); and "the aggregate retail cost of the energy which is likely to be consumed annually," *id.* § 6291(7). As such, "measure of energy consumption" does not encompass the information California requires manufacturers to place on their appliances, such as the manufacturer's name and the appliance's model number and date of manufacture.

The issue then becomes how to interpret "with respect to." The interpretation of the phrase "relates to" instructs us on how to interpret the phrase "with respect to," as both phrases are similar in scope and meaning. The Supreme Court has stated that "the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminancy,' or else 'for all practical purposes pre-emption would never run its course.'" *Egelhoff v. Egelhoff*, 532 U.S. 141, 146, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001) (quoting *Travelers*, 514 U.S. at 655, 115 S.Ct. 1671). The Court has also "cautioned against an 'uncritical literalism' that would make pre-emption turn on 'infinite connections.'" *Id.* at 147, 121 S.Ct. 1322 (quoting *Travelers*, 514 U.S. at 656, 115 S.Ct. 1671). As Justice Scalia observed, "[e]verything is related to everything else." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (Scalia, J., concurring). The issue is whether the relation is "indirect, remote, and tenuous" or not. *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir.1998). The relation between placing a manufacturer's name, the model name, and the date of manufacture on an appliance and measures of

energy consumption, as defined in EPCA, is indirect, remote, and tenuous.

Therefore, we conclude that the marking requirements contained in sections 1607(b) and (c) of Title 20 of the California Code of Regulations are not preempted by EPCA.

We also hold that section 1607(d)(1)[10] of the California regulations is not preempted by EPCA, as the section only requires compliance with federal marking requirements and, therefore, does not require the disclosure of information that is "other than information required" under federal law. 42 U.S.C. § 6297(a)(1). As the Fourth Circuit has stated, "if state law adopts or imposes a labeling requirement that is the same as the federal standard, even if the state law provides compensation or other remedies for a violation, so long as Congress chooses not to explicitly preempt the consistent law, it will not be said to be in conflict with federal law." *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1307 (4th Cir.1992). This reasoning is supported by *Medtronic*, in which the Supreme Court stated that "[t]he presence of a [state] damages remedy does not amount to the additional or

---

[10] Cal.Code Regs. tit. 20, § 1607(d)(1) provides:

(d) Energy Performance Information.

(1) Federally-Regulated Consumer Products.

The marking required by 16 C.F.R. Part 305 (2001) shall be displayed on all units of all federally-regulated consumer products of the following classes:

Refrigerators Refrigerator-freezers Freezers Central air conditioners Heat pumps Dishwashers Water heaters Room air conditioners Warm air furnaces Pool heaters Clothes washers Clothes dryers Fluorescent lamp ballasts Showerheads Faucets Water closets Urinals General service fluorescent lamps Incandescent reflector lamps Direct heating equipment Medium-base compact fluorescent lamps Cooking equipment (kitchen ranges and ovens).

Cal.Code Regs. tit. 20, § 1607(d)(1).

different 'requirement' that is necessary under the [federal] statute; rather, it merely provides another reason for manufacturers to comply with identical existing 'requirements' under federal law." 518 U.S. at 495, 116 S.Ct. 2240. Because Cal.Code Regs. tit. 20, § 1607(d)(1) merely provides appliance manufacturers another reason to comply with existing requirements under federal law, the California regulation is not preempted.

The final marking regulation Trade Associations argues is preempted by federal law, Cal.Code Regs. tit. 20, § 1607(d)(2),[11] also does not require the disclosure of information "other than information required" under federal law, and is thus not preempted. Section 1607(d)(2) requires federally-regulated commercial and industrial equipment to be marked with information. The relevant preemption provision is located at 42 U.S.C. § 6316(a)-(b), which was enacted as part of EPAct.

California regulation section 1607(d)(2) is not pre-empted because there are no federal labeling rules for the EPAct-covered equipment that are subject to California's marking requirements.[12] Where EPAct authorizes the DOE to take

---

[11] Cal.Code Regs. tit. 20, § 1607(d)(2) provides:

> (d) Energy Performance Information.
>
> (2) Federally-Regulated Commercial and Industrial Equipment: Each unit of an appliance listed in Table V that is federally-regulated commercial and industrial equipment shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, with the applicable energy performance information shown in Table V, and such information shall also be included on all printed material that is displayed or distributed at the point of sale.

Cal.Code Regs. tit. 20, § 1607(d)(2).

[12] The DOE has adopted labeling rules for electric motors. 10 C.F.R. § 431.83. However, the California regulations on EPAct-covered equipment do not include electric motors; they cover only space heating, air-conditioning, and water heating equipment. *See* Cal.Code Regs. tit. 20, § 1607(d)(2), Table V.

action that would preempt inconsistent state regulations, the DOE's inaction, without more, fails to preempt relevant state regulations.

Sections 6316(a) and (b) preempt "any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use . . . if . . . such State regulation requires disclosure of information . . . of any covered product *other than* information required" under federal law. 42 U.S.C. § 6297(a)(1) (emphasis added). Thus, state regulations are preempted at any time if they require the disclosure of information other than what is required under federal law.

The DOE's inaction alone cannot preempt state regulations. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988). "When a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action." *Id.* Under EPAct, the DOE must prescribe labeling rules for classes of covered equipment for which the DOE has exercised its discretion to prescribe test procedures. 42 U.S.C. § 6315(a). The DOE has not prescribed test procedures for most classes of covered equipment, and therefore has not reached the decision of whether to prescribe labeling rules. There is no indication that the DOE's inaction was a conscious and express decision under 42 U.S.C. § 6315(h)[13] to not promulgate labeling rules for EP Act-

[13] 42 U.S.C. § 6315 provides:

> The Secretary [of DOE] shall not promulgate labeling rules for any class of industrial equipment unless he has determined that—
>
> (1) labeling in accordance with this section is technologically and economically feasible with respect to such class;
>
> (2) significant energy savings will likely result from such labeling; and

covered equipment. "[I]t is essential that an agency declare, at a high degree of specificity, its intention that its *in* action preempt state law before we may assume such a desire and give it legal effect." *Baltimore & Ohio R.R. Co. v. Oberly*, 837 F.2d 108, 115 (3d Cir.1988). As the DOE has not done so, we cannot hold that Cal.Code Regs. tit. 20, § 1607(d)(2) is preempted because it requires something "other than" what federal law does.

C. Compliance and Enforcement Regulations

Lastly, Trade Associations argue that California's procedural regulations, found at Cal.Code Regs. tit. 20, § 1608, [14] that enforce the previously discussed substantive

---

(3) labeling in accordance with this section is likely to assist consumers in making purchasing decisions.

42 U.S.C. § 6315(h).

[14] Cal.Code Regs. tit. 20, § 1608, provides in relevant part:

(a) General Requirements for the Sale or Installation of All Appliances. Any unit of any appliance within the scope of Section 1601 may be sold or offered for sale in California only if:

(1) the appliance appears in the most recent database established pursuant to Section 1606(c), unless the only reason for the appliance's absence from the database is its failure to comply with an applicable standard in Section 1605.1[the applicable federal efficiency standard];

(2) the manufacturer has:

(A) tested the appliance as required by Sections 1603 and 1604;

(B) marked the unit as required by Section 1607;

. . .

(b) Appliances Not in Database.

If the Executive Director determines that an appliance that is not in the database is being sold or offered for sale in California, he or she shall take appropriate legal action to restrain and discourage such sale or offering, including, but not limited to testing units of the appliance at the manufacturer's cost and seeking appropriate judicial action.

Cal.Code Regs. tit. 20, § 1608.

regulations are preempted because they impermissibly enforce federal requirements. If the Commission's substantive regulations, as we have found, are not preempted by federal law, then the Commission's relevant compliance and enforcement provisions are also not preempted. The power to regulate must include the complementary power to enforce those regulations. California's compliance and enforcement provisions are not preempted by federal law.

IV

For these reasons, we agree with the Commission that the relevant California regulations which require manufacturers to submit data about their appliances, mark their appliances, and be subjected to related compliance and enforcement rules are not preempted by federal law. We therefore reverse the district court's decision finding these regulations preempted, vacate the injunction preventing the Commission from applying these regulations, and remand for further proceedings consistent with this opinion.

REVERSED, VACATED, AND REMANDED.

Furthermore, section 1608(e)-(g) requires the Executive Director of the Commission to periodically inspect appliances sold or offered for sale in California to determine whether they conform with the relevant energy efficiency and consumption standards. Cal.Code Regs. tit. 20, § 1608(e)(1). The Commission pays the costs of the initial testing. Cal.Code Regs. tit. 20, § 1608(f). If a tested, federally-regulated appliance performs worse than what is required under the applicable federal standard, the manufacturer must pay the cost for additional testing. Cal.Code Regs. tit. 20, §§ 1608(e)(2), (g), (f). The Executive Director informs the appropriate federal agency if the appliance's performance either is at variance with the results the manufacturer reported to the applicable federal agency or is not in compliance with the federal standard. Cal.Code Regs. tit. 20, § 1608(g). A federally-regulated appliance will be removed from the Commission's database due to its failure to comply with the applicable federal standard. Cal.Code Regs. tit. 20, §§ 1605(a)(1), 1608(c)(4), (d)(2)(B), (e)(2)(C).

NOONAN, *Circuit Judge*, dissenting:

The statutes at issue, inferentially the result of negotiation and compromise, deliberately spell out what is preempted by federal law. State regulations preempted are those that require "disclosure of information with respect to the energy use, energy efficiency or water use . . . other than the information required under section 6294 of this title." 42 U.S.C. § 6297(a)(1)(B). Where federal regulations do not require disclosure of such information to the federal government, a state is expressly prohibited from requiring such disclosure to consumers or to a state authority.

The majority opinion holds that the prohibition applies only to disclosure to consumers. The holding is a radical reduction of the key statutory term. "Disclosure," *Webster's Third New International Dictionary* (3d ed.1993) informs us, is "the act or an instance of opening up to view, knowledge or comprehension." Disclosure to a state agency is as much an opening up to view of the data as disclosure to consumers would be. Congress has chosen a broad term to prevent the imposition by a state of the burden of disclosure. Just as the meaning of "disclose" is "to expose to view" or "to make known," so the substantive noun referencing such an act is so extensive that it encompasses every compulsory revelation of the relevant information. Palpably the statute is meant to preempt the state from entering the federal domain.

I do not ask for "a broad reading" of "disclosure," but for an exact reading of a broad term. Obviously where the information is going to consumers as required by 42 U.S.C. § 6294, the meaning of disclosure is narrowed by the audience referenced. But narrowing in such a context does not limit the generality of the statutory term when no special context restricts it. That Congress did not use the term "disclosure" when describing reports to DOE does not have bearing on Congress's intent when it found a single com-

pendious way to say that manufacturers need not inform either the government or consumers.

Impatience with the restraints imposed by the precise preemptive words of the statute is also manifest when the majority deals with the phrase "other than" as the phrase refers to regulations other than federal regulations. 42 U.S.C. § 6316(a), (a)(4). Where there are no federal regulations on the subject because the DOE has not promulgated any regulations, then any state regulations are "other than" those federally required. The court indulges idiosyncratic imagination in supposing that there must be federal regulations in existence for "other than" to apply. Au contraire, if nothing exists, any state regulations are other than what exists as federal regulation. The fundamental tenet of express preemption is that Congress may preclude state involvement, even where it chooses not to regulate. Through its misreading of "other than" the court has imposed a heightened burden on the manufacturers to show implied preemption, despite Congress' express statement of preemption.

The court employs a presumption against preemption—a presumption only triggered by a showing the field to be one traditionally occupied by the states. *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2001). California alone regulates the uses at issue. California is not big enough single-handedly to generate the presumption. The fate of California's "Fleet Rules" may be augury of what is to come. *See Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004).

I would affirm the judgment of the district court.

APPENDIX B[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

[Filed June 11, 2003]

No. CIV. S-02-2437 WBS PAN

AIR-CONDITIONING AND REFRIGERATION INSTITUTE; GAS APPLIANCE MANUFACTURERS ASSOCIATION; ASSOCIATION OF HOME APPLIANCE MANUFACTURERS; and NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Plaintiffs,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION; WILLIAM J. KEESE, Chairman; and ROBERT PERNELL, ARTHUR H. ROSENFELD, JAMES D. BOYD, and JOHN L. GEESMAN, Commissioners, in their official capacities,

Defendants.

MEMORANDUM AND ORDER

In this action for declaratory and injunctive relief, plaintiffs, four nationwide trade organizations representing manufacturers of residential and commercial appliances and equipment, allege that defendants have adopted appliance efficiency regulations that are preempted by federal legislation. On December 13, 2002, the court granted plaintiffs' motion for a preliminary injunction regarding certain of the challenged regulations. Plaintiffs now move for judgment on the

---

[1] This appendix comprises the district court's Memorandum and order issuing a permanent injunction, as well as a brief Erata that the court filed on June 23, 2003.

pleadings pursuant to Federal Rule of Civil Procedure 12(c) and for final declaratory and injunctive relief.

I. Factual and Procedural Background

The energy efficiency of appliances is governed by two sets of federal legislation: (1) the Energy Policy and Conservation Act ("EPCA"), as amended by the National Appliance Energy Conservation Act of 1987 ("NAECA"), Pub. L. No. 100-12, 101 Stat. 103 (codified at 42 U.S.C. § 6291 *et seq.*); and (2) the Energy Policy Act of 1992 ("EPACT"), Pub. L. No. 102-486, 106 Stat. 2776 (codified at 42 U.S.C. § 6311 *et seq.*). NAECA contains efficiency standards, testing procedures, and labeling requirements, among other regulations, for certain residential appliances, referred to as "covered products." These include appliances such as refrigerators, room air conditioners, and fluorescent lamp ballasts. 42 U.S.C. § 6292(a) (enumerating "covered products"). EPACT contains similar regulations for certain types of industrial equipment, referred to as "covered equipment." These include certain electric motors, packaged terminal air conditioners and heat pumps, storage water heaters, and instantaneous water heaters. 42 U.S.C. § 6311(1) (defining "covered equipment"). Together, NAECA and EPACT provide the statutory framework under which the Federal Trade Commission ("FTC") and the Department of Energy ("DOE") exercise authority and promulgate regulations relating to the manufacture and marketing of appliances and equipment.

EPCA "was enacted in 1975 as part of a 'comprehensive national energy policy.'" *Natural Res. Def. Council v. Herrington*, 768 F.2d 1355, 1362 (D.C. Cir. 1985) (quoting S. Rep. No. 516, 95th Cong., 1st Sess. 116 (1975), U.S. Code Cong. & Admin. News 1975 p. 1762 (conference report)). NAECA and EPACT both contain preemption provisions. The NAECA preemption provision reads as follows:

> (1) Effective on March 17, 1987, this part supersedes any State regulation insofar as such State regulation

provides at any time for the disclosure of information with respect to any measure of energy consumption of any covered product if—

(A) such State regulation requires testing or the use of any measure of energy consumption, water use, or energy descriptor in any manner other than that provided under section 6293[2] of this title; or

(B) such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294[3] of this title.

42 U.S.C. § 6297(a)(1)(A), (B). In addition, NAECA provides general rules of preemption for state energy conservation standards both before and after a federal standard becomes effective for a product.[4] 42 U.S.C. §§ 6297(b), (c). EPACT incorporates all the preemption provisions of 42 U.S.C. § 6297 and makes them applicable to "covered equipment." 42 U.S.C. § 6316.

In August 2001, the California legislature instructed defendant California Energy Commission ("CEC") to "[a]dopt and implement updated and cost-effective standards" for all appliances "whose use . . . requires a significant amount of energy on a statewide basis." Cal. Pub. Res. Code § 25553(b). By notice published on November 23, 2001, the CEC be-gan its rule-making on the regulations at issue in this case. The regulations were adopted by the CEC on February 6, 2002, and, after several revisions, approved by the California Office

---

[2] 42 U.S.C. § 6293 contains provisions relating to testing procedures used in assessing appliance efficiency.

[3] 42 U.S.C. § 6294 contains provisions relating to appliance labeling.

[4] The general rules provide for certain enumerated exceptions that are not relevant to this action.

of Administrative Law on October 28, 2002. The appliance regulations were scheduled to go into effect on November 27, 2002.

On November 7, 2002, plaintiffs filed this suit for declaratory and injunctive relief. Plaintiffs' complaint sets forth eight specific challenges to the CEC regulations.

- Count One alleges that the CEC section 1607 marking requirements for NAECA "covered products" are preempted by 42 U.S.C. § 6297.
- Count Two alleges that the CEC section 1607 marking requirements for EPACT "covered equipment" are preempted by 42 U.S.C. § 6316.
- Count Three alleges that CEC section 1606 information disclosure and pre-market approval requirements are preempted by 42 U.S.C. § 6297.
- Count Four alleges that CEC sections 1604(f) and 1605.3(f) establish test procedures and efficiency standards that are preempted by 42 U.S.C § 6297(a), (b), and (c).
- Count Five alleges that CEC section 1605.1(c)(1) misrepresents federal standards with respect to four air conditioner products.
- Count Six alleges that federal law prohibits the CEC from enforcing federal requirements concerning appliance efficiency.
- Count Seven alleges that the CEC's interpretation of the term "new construction" in section 1606(H)(1)(F) is preempted as impermissibly broad.
- Count Eight alleges that the CEC's requirements unduly burden interstate commerce.

Plaintiffs moved for a preliminary injunction regarding Counts One, Two, Three, Four, and Five of the complaint. On

December 13, 2002, the court enjoined enforcement of the following regulations:

- CEC section 1607(d)(2) (marking requirements for NAECA "covered equipment");
- CEC section 1606's information disclosure and pre-market approval requirements, and the related enforcement provisions of CEC sections 1608(a) and (b); and
- CEC sections 1605.3(f) and 1604(f)(5), as they relate to under-20-gallon water heaters.

The court denied the remainder of plaintiffs' motion for preliminary injunction without prejudice on the ground that plaintiffs had not sufficiently demonstrated irreparable harm as to CEC sections 1607(b), (c), and (d)(1)(B), CEC section 1606(a)(3)(E)'s rounding rule, and CEC section 1605.1(c)(1), in light of a planned emergency rule-making session.

Subsequent to the court's issuance of the preliminary injunction, the CEC engaged in an emergency rule-making session to address the issues raised by this litigation. The CEC adopted several amendments to the regulations. Both parties agree that, as a result of the amendments, plaintiffs' challenges to CEC section 1607(d)(1)(B), which was part of Count One, and Counts Four and Five are now moot. Regarding this motion for judgment on the pleadings, therefore, the court need only address the remaining issues in Count One and Counts Two, Three, Six, Seven, and Eight.

II. Discussion

A. Applicable Legal Standard

Pursuant to Federal Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "Generally, district courts have been unwilling to grant a Rule 12(c) dismissal 'unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is

entitled to judgment as a matter of law.'" *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984) (quoting C. Wright & A. Miller, *Federal Practice and Procedure: Civil*, § 1368 at 690 (1969)).

The same standard applies to motions made under Rule 12(c) as applies to motions made under Rule 12(b)(6). *See* 2 James Wm. Moore et al. *Moore's Federal Practice* § 12.38 (3d ed. 2002). Therefore, on a motion for judgment on the pleadings, the factual allegations of the non-moving party are taken as true. *Doleman*, 727 F.2d at 1482 (citing *Austad v. United States*, 386 F.2d 147, 149 (9th Cir. 1967)). "Courts dismiss complaints under Rule 12(c) for either of two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory." *Young v. Car Rental Claims, Inc.*, _ F. Supp. 2d _, No. CV02-00770, 2003 WL 1786471, at *2 (D. Haw. March 31, 2003). When deciding a Rule 12(c) motion, the court "may consider pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matter of which the Court may take judicial notice; the Court may also consider documents not explicitly incorporated in or attached to the complaint if the complaint necessarily relies on these documents and their authenticity is not questioned." *Milne v. Slesinger*, No. CV02-08508, 2003 WL 21076983, at *3 (C.D. Cal. May 8, 2003).

Under the Supremacy Clause of the Constitution, Congress has the power to pass legislation that preempts state law. *See* U.S. Const. art. VI, cl. 2; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law."). Such preemption may be either express or implied. Here, plaintiffs argue only express, not implied, preemption. Express preemption may be found where Congress has explicitly stated "the extent to which its enactments preempt state law." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) ("Pre-emption is fundamentally a question of congressional intent, and when Congress has made its intent known

through explicit statutory language, the courts' task is an easy one.") (internal citation omitted)).

In determining the scope of an express preemption provision, the court is guided by two presumptions. *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). First, the court presumes that "'the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Second, "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Id.* (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Congressional intent is "primarily discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Id.* (citation omitted).

B. Plaintiffs' Claims

1. Count One: CEC § 1607 Marking Requirements for NAECA "Covered Products"

a. CEC §§ 1607(b) and (c)

Under CEC section 1608(a)(2)(B), all the marking requirements set forth in CEC section 1607 must be met for "any unit of any appliance . . . sold or offered for sale in California." CEC section 1607(b) requires that the manufacturer's name, brand name or trademark, the model number, and the date of manufacture (year and month, or smaller increment) be "permanently, legibly, and conspicuously displayed on each unit."[5] If the date is in a code that is "not readily understandable to the layperson," section 1607(b) requires manufacturers to provide the code immediately, on request, to the CEC. Section 1607(c) further provides that: (1) for plumbing fixtures and plumbing fittings, the required information be displayed on an accessible place on each unit or on the unit's

[5] The amended section 1607(b) no longer requires that this information appear on the product's nameplate.

packaging; (2) for lamps, the required information be displayed on an accessible place on each unit, or the unit's packaging, or "where the unit is contained in a group of several units in a single package, on the packaging of the group"; and (3) for fluorescent lamp ballasts, that the date of manufacture indicate year and three-month or smaller increment.

In analyzing whether these requirements are preempted, the court must begin, as it does in any statutory analysis, with the plain language of the statute. *See United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999) ("If the language of the statute is clear, we need look no further than that language in determining the statute's meaning."). Relevant to the court's analysis of the plain language of a statute is "'the structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended its regulatory scheme to affect business, consumers, and the law." *Medtronic*, 518 U.S. at 488.

NAECA provides, in pertinent part, for preemption of state regulations that require "the disclosure of information with respect to any measure of energy consumption or water use of any covered product if—such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294 of this title." 42 U.S.C. § 6297(a)(1)(B). CEC sections 1607(b) and (c) clearly require the disclosure of information. *See* Section II(B)(3), *infra* (discussing the meaning of "disclosure of information"). Therefore, the court must determine: (1) if this disclosure of information is "with respect to any measure of energy consumption or water use" and (2) if it is, whether the disclosure of information required by the CEC regulations is "other than information required by section 6294."

On their face, CEC sections 1607(b) and (c), which require disclosure of the manufacturer's name, the model number, and the date of manufacture, do not appear to call for the disclosure of information with respect to any measure of energy consumption or water use. However, at oral argument on plaintiffs' motion for preliminary injunction, defendants stated that it was necessary to have the date of manufacture on the products to determine compliance with energy consumption standards. (Dec. 5, 2002 Hr'g Tr. at 41:22-42:14). In addition, in defendants' opposition, they state that "[a]ll of the marking requirements [in section 1607] help foster EPCA's primary goal of energy efficiency," and that "[t]he purpose of [these] regulations is to allow compliance and enforcement personnel . . . to determine quickly which efficiency standard is applicable . . . ." Therefore, because the purpose of the regulations appears to be facilitating determinations of whether products comply with energy efficiency standards, CEC sections 1607(b) and (c) do require disclosure of information with respect to any measure of energy consumption.

Thus, the court must determine whether this disclosure of information is "other than information required under section 6294." Section 6294 of NAECA provides for labeling requirements for "covered products." The requirements of NAECA, including those of section 6294, are implemented through FTC regulations. 16 C.F.R. § 305.1 (setting forth the scope of the regulations implementing NAECA).

The FTC regulations require, among other things, that the name of the manufacturer and the model number appear on the labels of most "covered products." 16 C.F.R. § 305.11(a)(5)(B), (a)(5)(C). Regarding lighting products, the FTC regulations do not require the manufacturer's name or the model number to appear on the label. 16 C.F.R. § 305.11(d), (e). The FTC regulations do not require that the labels of "covered products" include the date of manufacture. Rather, the federal regulations require that the date of manufacture be reported to the FTC whenever a new basic model is

introduced on the market, or, for fluorescent lamp ballasts, with the first submission for each basic model. 16 C.F.R. § 305.8(a)(1), (a)(2). The federal regulations also provide manufacturers with options regarding the placement of labels on "covered products" and allow the information to be displayed on a hang tag instead of an affixed label. 16 C.F.R. § 305.11(6), (7).

The requirements of CEC sections 1607(b) and (c) go beyond the federal requirements in two ways: (1) by providing that the date of manufacture be marked on "covered products" when the FTC regulations require only that this information be submitted to the FTC in certain circumstances; and (2) by providing that the manufacturer's name and model number be marked on the products themselves rather than on a label or hang tag (or in the case of lighting products not provided on a label at all), as required by the FTC regulations. Therefore, CEC sections 1607(b) and (c) require the disclosure of information "other than" what is required by section 6294 and its implementing regulations.

Accordingly, because CEC sections 1607(b) and (c) require disclosure of information with respect to any measure of energy consumption and because that disclosure is "other than" what is required by section 6294, CEC sections 1607(b) and (c)—creating marking requirements for "covered products"—are preempted under the plain language of NAECA.

b. CEC § 1607(d) (1)

CEC section 1607(d)(1) states that "[t]he marking required by 16 CFR Part 305 (2001) shall be displayed on all unites [sic] of all federally-regulated consumer products of" certain classes. Plaintiffs contend that this regulation is an impermissible attempt to enforce a federal standard. Defendants acknowledge that the CEC does not have the authority to enforce federal efficiency standards at the point of sale. *See* Section II(B)(4), *infra*, (further discussing state enforcement of federal standards). As discussed above, marking require-

ments relate to energy efficiency standards in that they facilitate compliance determinations. *See* Section II(B)(1)(a), *supra*. Under CEC section 1608(a)(2)(B), all the marking requirements set forth in CEC section 1607 must be met for appliances sold or offered for sale in California. Therefore, if a product did not comply with the federal marking requirements incorporated into CEC section 1607(d)(1), the CEC could potentially block the product's sale in California. Because such blockage would constitute impermissible enforcement of a federal standard, CEC section 1607(d)(1) is preempted.

2. Count Two: CEC § 1607 Markinq Requirements for EPACT "Covered Equipment"

CEC section 1607(d)(2) requires that "covered equipment" be marked with "applicable energy performance information shown in Table V" of the regulation. With regard to this regulation, defendants reiterate the argument they made at the preliminary injunction stage—that, because the DOE has not prescribed labeling rules for most "covered equipment," the CEC is merely filling a regulatory gap left by DOE inaction.[6] Under 42 U.S.C. § 6315, the DOE is authorized to prescribe labeling rules for classes of "covered equipment" for which a test procedure has been prescribed. The DOE's power to prescribe test procedures under EPACT is discretionary. 42 U.S.C. § 6314(a). Therefore, the lack of DOE regulations regarding the labeling of "covered equipment" is due to the fact that, currently, the DOE has not prescribed test procedures for most classes of "covered equipment."

The EPACT preemption provision states that a state regulation that provides "*at any time* for the disclosure of information with respect to any measure of energy consumption" is preempted where the required disclosure is of information

---

[6] The DOE has prescribed marking requirements for electric motors. *See* 10 C.F.R. §§ 431.81, 431.83.

"other than" what is required by EPACT's labeling provision. 42 U.S.C. § 6316 (incorporating the NAECA preemption provision found in 42 U.S.C. § 6297) (emphasis added). Therefore, the statutory language does not contemplate that preemption of state regulations regarding the marking of "covered equipment" is dependent on the passage of federal regulations regarding labeling.

In addition, the touchstone of any preemption analysis is Congressional intent. *See Medtronic*, 518 U.S. at 485. As discussed above, EPCA, the statute preceding NAECA and EPACT, was enacted as part of a comprehensive national energy policy. *See* S. Rep. No. 516 (1975). Furthermore, NAECA resulted from a situation where "appliance manufacturers were confronted with the problem of a growing patchwork of differing State regulations which could increasingly complicate their design, production and marketing plans. Regulations in a few populous States could as a practical matter determine the product lines sold nationwide, even in States where no regulations existed."[7] S. Rep. No. 100-6 at 4 (1987). EPACT incorporates NAECA's preemption provisions. Thus, Congress clearly intended to create some uniformity in regulations under the EPACT regime.

Therefore, as discussed at length in the court's December 13, 2002 Order, where: (1) preemption is effective "at any time"; (2) Congress clearly intended to create a comprehensive energy policy scheme and a statute with some preemptive effect; and (3) an agency is vested with discretion in promulgating regulations, as the DOE is here, DOE inaction

---

[7] Defendants state that the language regarding the "patchwork of differing state regulations" refers only to Congressional concern about potentially differing state regulations establishing efficiency standards. Even if this statement was made in the context of a discussion of efficiency standards, there is no evidence that congressional concern about the problematic situation that would be created if different states enacted different regulations was limited solely to efficiency standards.

does not create a regulatory gap that the states are free to fill as they like. Rather, in light of the circumstances listed above and the EPACT statutory framework, the decision by the DOE to forego, for the time being, promulgating test procedures and accompanying regulations for most classes of "covered equipment," implies a determination that the area is best left unregulated.[8] *See Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." (emphasis in original)); *see also* Dec. 13, 2002 Order Section II(B)(1). Accordingly, CEC section 1607(d)(2) is preempted by EPACT.

---

[8] According to a declaration submitted by defendants, the DOE drafted a final rule for test procedures for "covered equipment" in 2000 "during the course of an extensive rulemaking," but the rule has not yet been published. (Martin Supp. Decl. ¶ 20). The mere fact that a forthcoming federal rule may preempt a state rule in the future does not mean that the current state rule must "give way under the Supremacy Clause." *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 172 (1978). However, the fact that the DOE has engaged in rulemaking on test procedures for "covered equipment" bolsters the conclusion that the current lack of DOE regulations in this area is the result of an exercise of DOE discretion. Moreover, the preemption provisions at issue in the cases defendants cite in support of their argument that DOE inaction should have no preemptive effect are different from the preemption clause at issue here, which, the court has determined, is not dependent upon the promulgation of federal regulations. *See Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 620 (2d Cir. 1993) (stating that preemption provision in the Federal Hazardous Substances Act was contingent on existence of federal regulation addressing same issues as state regulation); *New Jersey State Chamber of Commerce, v. Hughey*, 774 F.2d 587, 592 (3d Cir. 1985) (stating that OSHA's preemption provision expressly gives states the authority to regulate matters not governed by a federal standard).

3. Count Three: CEC § 1606 Information Disclosure and Pre-Market Approval Requirements

a. Information Disclosure and Pre-Market Approval Requirements

CEC section 1606 requires manufacturers to submit specified information to the CEC for each appliance offered for sale or sold in California. In particular, CEC section 1606(a), Table U, sets forth the specific information that must be submitted for various appliances, including both "covered products" and "covered equipment". The recent amendments to this regulation make the submission of some items of information contained in Table U voluntary, rather than mandatory. CEC sections 1606(a)(1)(A) and (B) provide that the CEC's executive director will specify formats and schedules for information submittal. CEC section 1606(b) then provides for a procedure by which the executive director will review the submitted statements and determine whether or not an appliance complies with CEC regulations.[9]

The parties dispute whether the phrase "disclosure of information," which is used in both the introductory and modifying clauses of section 6297, should be interpreted broadly or narrowly. Defendants contend that: (1) "disclosure of information" should be interpreted narrowly as referring only to labeling requirements and "other point of sale information disclosure to consumers"; and (2) even if the CEC regulations require "disclosure of information" within the meaning of NAECA's preemption provision, they do not require data regarding measures of energy consumption or water use. The

---

[9] CEC section 1606(b)(2)(A) delineates time periods within which the executive director must inform manufacturers as to whether their products are compliant. For example, through February 28, 2004, if the manufacturer's submission of information is filed electronically, the executive director must inform the manufacturer of the determination within thirty calendar days after the receipt of the submission.

meaning of the phrase "disclosure of information" is somewhat unclear from the plain language of section 6297. Therefore, the court must look to the statutory framework to determine the meaning of this phrase. Furthermore, where the statutory language is ambiguous, the court "may look to legislative history as a guide to its meaning." *United States v. McElyea*, 158 F.3d 1016, 1018-19 (9th Cir. 1998).

The statutory and regulatory framework of NAECA contemplates disclosures of information regarding energy consumption that go beyond disclosures of information on labels. *See* Dec. 13, 2002 Order at Section II(C)(1)(a). For example, section 6296(d) of NAECA states that the DOE may require manufacturers of "covered products" to submit information or reports to the DOE regarding, among other things, energy efficiency, energy use, or water use of "covered products."[10]

In addition, the FTC regulations implementing NAECA provide both labeling requirements and requirements for the submission of data to the FTC including data regarding "the estimated annual energy consumption . . . or energy efficiency rating . . . for each basic model in current production." 16 C.F.R. § 305.8(a)(1). The FTC regulations also require the submittal of the "model numbers for each basic model; the total energy consumption, determined in accordance with § 305.5, used to calculate the estimated annual energy con-

---

[10] Defendants contend that section 6296 is of "dubious relevance" to the preemption inquiry because section 6297 refers only to sections 6293 and 6294, the testing and labeling provisions of NAECA, in its modifying clauses. However, when a statutory phrase is ambiguous, the court must look to the overall statutory framework to discern the meaning of the phrase. *See Medtronic*, 518 U.S. at 488. Moreover, the provisions of section 6296 are inextricably related to those of section 6294. For example, manufacturers of "covered products" to which a rule under section 6294 applies must, upon request, "provide the data from which the information included on the label and required by the rule was derived." 42 U.S.C. § 6296(b)(2).

sumption or energy efficiency rating; the number of tests performed; and, its capacity . . . ." *Id.*

While defendants are correct that section 6294(c) refers to labels and other information provided to consumers at the point of sale, as the above discussion makes clear, NAECA and its implementing regulations encompass disclosures of information that go beyond disclosures made to consumers at the point of sale and include disclosures to federal agencies. Accordingly, the phrase "disclosure of information" cannot be read narrowly as defendants suggest. Rather, "disclosure of information" encompasses disclosures of information such as the ones required by CEC section 1606.

The court must therefore determine whether CEC section 1606 requires the disclosure of information with respect to measures of energy consumption or water use such that CEC section 1606 is preempted by NAECA. NAECA defines "measure of energy consumption" as "energy use, energy efficiency, estimated annual operating cost, *or other measure of energy consumption.*" 42 U.S.C. § 6291(8) (emphasis added). The statute defines "energy use" as "the quantity of energy directly consumed by a consumer product at point of use", and "energy efficiency" is defined as "the ratio of the useful output of services from a consumer product to the energy use of such product." 42 U.S.C. §§ 6291(4), (5).

According to defendants, taking these statutory definitions together, "section 6297(a)(1) could preempt a State regulation on 'the disclosure of information with respect to any measure of energy consumption . . . of any covered product' only if the information specifically describes *how much energy the product 'directly consume[s]'* . . . or, for measures of energy efficiency, *how much useful output the appliance produces in relationship to its energy use.*" Defendants' definition, however, ignores the "or other measure of energy consumption" language contained in the statutory definition. Moreover, as discussed in the context of the marking of "covered pro-

ducts," information that is not apparently related to measures of energy consumption, such as the date of manufacture, may still relate to compliance with measures of energy consumption. *See* Section II(B)(1)(a), *supra*.

Finally, as the court noted in its previous order, allowing each state to require manufacturers to submit different pieces of information about their products opens the door to the creation of the precise situation that Congress sought to avoid in passing NAECA—subjecting manufacturers to a patchwork of potentially inconsistent state regulations. *See* Dec. 13, 2002 Order at Section II(C)(1)(a)(i); *see also* Section II(B)(2), *supra*. Therefore, because CEC section 1606 provides for "the disclosure of information with respect to any measure of energy consumption or water use," its information-reporting requirements, and the related pre-market approval requirements in CEC section 1608(a), are preempted by NAECA.

While the DOE has not promulgated a regulatory scheme for "covered equipment" under EPACT similar to the one the FTC has promulgated under NAECA, EPACT expressly applies the NAECA preemption provision and the relevant provisions of section 6296 to "covered equipment." 42 U.S.C. §§ 6316(b)(1). As discussed in Section II(B)(2), *supra*, preemption under EPACT is not contingent on the promulgation of regulations by the DOE. Therefore, the CEC's information submittal requirements are also preempted as applied to "covered equipment."

b. The Rounding Rule

CEC section 1606(a)(3)(E) (the "rounding rule") provides rules regarding how test data required to be submitted under Table U must be reported. Because the court has determined that the information submittal requirements for "covered products" and "covered equipment" are preempted, the issue of how test data must be reported to the CEC is moot. Accord-

ingly, the court need not address whether the rounding rule is preempted.

4. Count Six: CEC Enforcement of Federal Requirements

Plaintiffs claim that the CEC cannot enforce federal requirements regarding "covered products" and "covered equipment." In particular, plaintiffs allege that the CEC regulations impermissibly allow state enforcement of federal energy efficiency standards.[11] Defendants acknowledge that, pursuant to section 6297(c),[12] the CEC does not have the authority to enforce federal efficiency standards at the point of sale, and CEC section 1608(a)(4) has been amended to clarify that the CEC cannot block the sale of a product in California based solely on the product's failure to comply with a federal standard. Therefore, the court must consider whether any of the remaining enforcement provisions in the CEC regulations are preempted.

CEC section 1608(e) sets forth provisions for the "enforcement testing of appliances." Under section 1608(e), the CEC executive director "shall periodically cause" the testing of appliances—pursuant to federal testing procedures—to determine whether these products comply with federal and state standards that are set forth in section 1605 of the regulations. If it is determined, after calculating the mean results of two tests, that a product is not compliant, that

---

[11] Plaintiffs' objections to the CEC's enforcement of federal marking requirements are discussed at Section 11(B)(1)(b), *supra*.

[12] Section 6297(c), in pertinent part, provides that, with certain exceptions not relevant here, when a federal energy conservation standard becomes effective for a covered product pursuant to section 6295, "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product . . . ." Although defendants seek to confine the limitation on their enforcement powers to enforcement at the point of sale, no such limitation is evident from the language of the statute.

product will be removed from California's database. CEC §§ 1608(e)(1), (2). In the case of a federally regulated appliance, if the test results for a product do not meet a federal standard or are at variance with what the manufacturer has reported to the DOE or the FTC, the regulations provide that the CEC shall inform the proper federal agency. CEC § 1608(g). The cost of testing, after the initial test, is borne by manufacturers.

Although the CEC regulations do not provide that products that do not comply with federal standards will be banned from sale in California, CEC section 1608 still sets up a mandatory testing regime for federally regulated appliances that results in certain negative consequences for failure to comply. Such mandatory testing requirements that are designed to ensure compliance with federal standards are not meaningfully distinguishable from the enforcement of federal energy efficiency standards. Accordingly, the enforcement provisions of CEC section 1608, as they apply to "covered products" and "covered equipment," are preempted.

5. Count Seven: The CEO's Interpretation of the Term "New Construction"

Section 6297(c)(3) contains an exception to the preemption of state regulations "concerning the energy efficiency, energy use, or water use" of a covered product if the state regulation is "in a building code for new construction . . . ." CEC section 1606(h)(1)(F) uses the term "new construction" in a section containing a statement that is required to be placed in a trade directory that can be used for any purpose the CEC database created pursuant to section 1606(c) is used for.[13] The California building code applies both to new buildings and to

[13] The relevant part of section 1606(h)(1)(F) states that a trade directory must contain a statement saying that "UNLESS INDICATED OTHERWISE, any appliance listed in this directory . . . may be sold, offered for sale, or installed in new construction in California."

any new construction in existing buildings for which a building permit is required. Cal. Code Regs. tit. 24, §§ 100(d)(2), 100(d)(3), 100(a) (2001).[14]

"New construction" is not defined by NAECA or EPACT and has not been interpreted in the implementing regulations for either statute. Moreover, the meaning of the phrase is not apparent from the text of the statutory provision in which it appears, and the parties have not cited to any relevant legislative history regarding the construction of this phrase. Plaintiffs urge the court to adopt the definition of "new construction" that has been used in other federal regulations—that "new construction" refers to the building of a new structure and/or an addition to an existing structure that increases the floor area by more than 100 percent—not to any new construction in existing buildings for which a building permit is required. *See* Pls.' P. & A.'s at 26 n.39 (citing U.S. Dep't of Housing and Urban Development regulations 24 C.F.R. § 583.5 and 24 C.F.R. § 884.01; Dep't of Veterans Affairs regulation 38 C.F.R. § 17.701; and Federal Emergency Management Agency regulation 44 C.F.R. § 9.4).

However, when passing legislation, Congress is generally presumed "knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486

---

[14] In a series of related arguments, defendants contend that because plaintiffs have not shown that they have been injured or "adversely affected" by the CEC's definition of new construction: (1) plaintiffs do not have standing to assert this claim; (2) that the claim is not ripe; and (3) that the court does not have subject matter jurisdiction under 42 U.S.C. § 6306(c). Although the declarations submitted by plaintiffs do not specifically address the injury that may be caused by the definition of "new construction," plaintiffs have detailed the various burdens on manufacturers that are created by a state regulatory scheme that is different from a federal regulatory scheme. Accordingly, the court is satisfied that plaintiffs have demonstrated injury such that the court may reach the merits of plaintiffs' claim that the CEC's definition of "new construction" is preempted.

U.S. 174, 184-85 (1988) (stating that, "in the absence of affirmative evidence in the language or the history of the statute," the Court was unwilling to assume that Congress was ignorant of relevant state laws). When NAECA was passed, the California building code used the phrase "new construction" in the same context as the phrase is used in the current code. The parties dispute whether the scope of the phrase is exactly the same in the current California code as it was in the California building code that was in existence when NAECA was passed.

Regardless, plaintiffs have not demonstrated that Congress intended a more restrictive meaning of "new construction" than that contained in the California Code or that Congress was ignorant of California's use of the phrase "new construction" in its building code.[15] In light of the presumption that Congress is aware of relevant state laws when it enacts federal legislation, the court cannot determine, on the record currently before it, that California's definition of "new construction" is preempted.[16]

6. Count Eight: Burden on Interstate Commerce

Finally, plaintiffs contend that the CEC regulations at issue in this litigation constitute an impermissible burden on interstate commerce. This claim is moot as to those regulations that the court has determined are preempted. Therefore, the

---

[15] Indeed, Congress was clearly aware of the existing California energy efficiency standards when it passed NAECA because it referred to them in section 6295(b)(3)(A)(ii)(I) of NAECA.

[16] In addition, as plaintiffs' citations to other federal statutes where the term "new construction" has been defined in implementing regulations evidences, the federal government is capable of specifically defining "new construction" where it wishes to do so. In the absence of any indication that Congress intended to impart a specific definition to "new construction" in the statute at issue here, the court is unwilling to write plaintiffs' definition of that phrase into the statute.

court must consider this claim only as to the California definition of "new construction."

In order to establish a claim under the dormant Commerce Clause, a party must show that: (1) "the state law or regulation in question penalizes interstate commerce" and (2) that it "does so without sufficient economic justification." *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 857 (9th Cir. 2002) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Plaintiffs have advanced no arguments in support of their claim that the CEC regulations burden interstate commerce. Moreover, it is far from clear that using a broad definition of "new construction" in California penalizes interstate commerce. Accordingly, the court cannot conclude that the California definition of "new construction" violates the dormant Commerce Clause.

IT IS THEREFORE ORDERED that:

(1) plaintiffs' motion for judgment on the pleadings be, and the same hereby is, DENIED as to the term "new construction" as used in CEC section 1606(h)(1)(F) and Title 24 of the California Code of Regulations; and

(2) plaintiffs' motion for judgment on the pleadings be, and the same hereby is, GRANTED as to CEC sections 1606, 1607(b) and (c), 1607(d)(1) and (d)(2), and the related enforcement and pre-market approval provisions of CEC section 1608. Defendants are permanently enjoined from enforcing those regulations as against plaintiffs.

DATED: June 10, 2003

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 3, 2005]

No. 03-16621
D.C. No. CV-02-02437-WBS/PAN

AIR CONDITIONING AND REFRIGERATION INSTITUTE; GAS APPLIANCE MANUFACTURERS ASSOCIATION; ASSOCIATION OF HOME APPLIANCE MANUFACTURERS; NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Plaintiffs-Appellees,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION; WILLIAM J. KEESE, Chairman; ROBERT PERNELL, Commissioner; AURTHUR H. ROSENFELD, Commissioner; JAMES D. BOYD, Commissioner; JOHN L. GEESMAN, Commissioner,

Defendants-Appellants.

ORDER

Before: B. FLETCHER, NOONAN, and THOMAS, *Circuit Judges.*

The attached amended opinion is substituted for the original opinion filed by the panel. With the amendments, Judge B. Fletcher and Judge Thomas have voted to deny the petition for rehearing. Judge Noonan has voted to grant the petition for rehearing.

The petition for rehearing en banc was circulated to the entire court. No judge of the court called for a vote on the petition for rehearing en banc within the time established to do so.

The petition for rehearing and petition for rehearing en banc are DENIED.

No further petitions for rehearing will be entertained.

APPENDIX D

FEDERAL STATUTE

42 U.S.C. § 6316. Administration, penalties, enforcement, and preemption

(a) Application of certain sections to same extent and in same manner as applicable in part A

The provisions of section 6296(a), (b), and (d) of this title, the provisions of subsections (l) through (s) of section 6295 of this title, and section[1] 6297 through 6306 of this title shall apply with respect to this part (other than the equipment specified in subparagraphs (B), (C), (D), (E), and (F) of section 6311(1) of this title) to the same extent and in the same manner as they apply in part A of this subchapter. In applying such provisions for the purposes of this part—

(1) references to sections 6293, 6294, and 6295 of this title shall be considered as references to sections 6314, 6315, and 6313 of this title, respectively;

(2) references to "this part" shall be treated as referring to part A-1 of this subchapter;

(3) the term "equipment" shall be substituted for the term "product";

(4) the term "Secretary" shall be substituted for "Commission" each place it appears (other than in section 6303(c) of this title);

(5) section 6297(a) of this title shall be applied, in the case of electric motors, as if the National Appliance Energy Conservation Act of 1987 was the Energy Policy Act of 1992;

(6) section 6297(b)(1) of this title shall be applied as if electric motors were fluorescent lamp ballasts and as if

---

[1] So in original. Probably should be "sections".

the National Appliance Energy Conservation Amendments of 1988 were the Energy Policy Act of 1992;

(7) section 6297(b)(4) of this title shall be applied as if electric motors were fluorescent lamp ballasts and as if paragraph (5) of section 6295(g) of this title were section 6313 of this title; and

(8) notwithstanding any other provision of law, a regulation or other requirement adopted by a State or subdivision of a State contained in a State or local building code for new construction concerning the energy efficiency or energy use of an electric motor covered under this part is not superseded by the standards for such electric motor established or prescribed under section 6313(b) of this title if such regulation or requirement is identical to the standards established or prescribed under such section.

(b) Application of certain sections with respect to certain equipment to same extent and in same manner as applicable in part A

(1) The provisions of section 6296(a), (b), and (d) of this title, section 6297(a) of this title, and sections 6298 through 6306 of this title shall apply with respect to the equipment specified in subparagraphs (B), (C), (D), (E), and (F) of section 6311(1) of this title to the same extent and in the same manner as they apply in part B of this subchapter. In applying such provisions for the purposes of such equipment, paragraphs (1), (2), (3), and (4) of subsection (a) of this section shall apply.

(2)(A) A standard prescribed or established under section 6313(a) of this title shall, beginning on the effective date of such standard, supersede any State or local regulation concerning the energy efficiency or energy use of a product for which a standard is prescribed or established pursuant to such section.

(B) Notwithstanding subparagraph (A), a standard prescribed or established under section 6313(a) of this title shall not supersede a standard for such a product contained in a State or local building code for new construction if—

(i) the standard in the building code does not require that the energy efficiency of such product exceed the applicable minimum energy efficiency requirement in amended ASHRAE/IES Standard 90.1; and

(ii) the standard in the building code does not take effect prior to the effective date of the applicable minimum energy efficiency requirement in amended ASHRAE/IES Standard 90.1.

(C) Notwithstanding subparagraph (A), a standard prescribed or established under section 6313(a) of this title shall not supersede the standards established by the State of California set forth in Table C-6, California Code of Regulations, Title 24, Part 2, Chapter 2-53, for water-source heat pumps below 135,000 Btu per hour (cooling capacity) that become effective on January 1, 1993.

(D) Notwithstanding subparagraph (A), a standard prescribed or established under section 6313(a) of this title shall not supersede a State regulation which has been granted a waiver by the Secretary. The Secretary may grant a waiver pursuant to the terms, conditions, criteria, procedures, and other requirements specified in section 6297(d) of this title.

* * * *

APPENDIX E

STATE REGULATIONS[1]

Cal. Code Regs. tit. 20, § 1606. Filing by Manufacturers; Listing of Appliances in Database.

(a) Filing of Statements.

Each manufacturer shall file with the Executive Director a statement for each appliance that is sold or offered for sale in California. The statement shall contain all of the information described in paragraphs (2) through (4) of this subsection and shall meet all of the requirements of paragraph (1) of this subsection and all other applicable requirements in this Article. For models that are in the active database before November 27, 2002, no information needs to be submitted until (i) any of the characteristics in Table V is changed or (ii) the model is discontinued.

The effective dates of this section shall be the same as the effective dates shown in Section 1605.1, 1605.2 or 1605.3 for appliances for which there is an energy efficiency, energy consumption, energy design, water efficiency, water consumption, or water design standard in Section 1605.1, 1605.2, or 1605.3. For appliances with no energy efficiency, energy consumption, energy design, water efficiency, water consumption, or water design standard in Section 1605.1, 1605.2, or 1605.3, the effective date of this section shall be January 1, 2006.

Exceptions: This subsection is not applicable to: 1. torchieres, and 2. non-commercial cooking products until, as determined by the Executive Director, there takes effect a federal standard or a federal reporting requirement for annual

---

[1] The California regulations are reproduced here in their current form. These regulations have been amended since the lawsuit was instituted, but not in any way material to the issues presented here.

cooking energy consumption or for a similar measure of energy performance, and 3. power supplies, and 4. consumer audio and video equipment, and 5. refrigerators without doors and freezers without doors that are not specifically designed for display and sale of bottled or canned beverages, and 6. walk-in refrigerators and walk-in freezers, and 7. under-cabinet luminaires, and 8. low-profile ceiling fans.

(1) General Rules.

(A) Format and Categories. Each statement shall be in a format (including but not limited to computer formats) and in categories specified by the Executive Director.

(B) When Different Statements are Required. The Executive Director may establish, modify, and enforce schedules for the submittal of statements where it is reasonably necessary for orderly processing of submittals, for example when manufacturers or third parties often submit many statements simultaneously.

(C) Asterisks in Model Numbers. In filing any statement, the manufacturer may use asterisks as a substitute for letters, numbers, blanks, or other characters in the model number, provided that an asterisk (i) shall be used only for a part of the model number that does not indicate energy consumption, energy efficiency, water consumption, or water efficiency, or a design or feature affecting such efficiency or consumption; (ii) shall represent a single letter, number, blank, or other character at the asterisk's location in the model number; and (iii) shall not be used for any of the first four letters, numbers, blanks, or other characters in the model number.

(D) Different Functions. Except as provided in Section 1606(a)(1)(G), if the same appliance is sold or offered for sale as more than one type of appliance shown in Table V (for example, if the appliance can serve both water heating and pool heating functions), the manufacturer shall submit a separate statement for each appliance type. Each appliance

type for which a statement is submitted must match all the common identifiers shown in Table V.

(E) Multiple Statements. A manufacturer may file statements for more than one appliance in a single submittal to the Executive Director. If a submittal contains statements for more than one appliance, there shall be only one statement for each appliance, except as provided in Sections 1606(a)(1)(D) and 1606(a)(1)(G). The Executive Director shall allow multiple statements to be submitted on the same sheet of paper or in the same electronic file under conditions she or he determines are reasonably necessary to ensure accuracy and compatibility with the database.

(F) Split System Central Air Conditioners. The statement for split system air conditioners shall be for the combination of the compressor-containing unit and the non-compressor-containing unit most likely to represent the highest national sales volume, consistent with Section 1604(c)(3).

(G) Combination Space-Heating and Water-Heating Appliances. Manufacturers of combination space-heating and water-heating appliances shall file two statements for each such appliance. The first statement shall contain the information listed in Table V for combination space-heating and water-heating appliances, and all other information shown in Table V for "all appliances;" and the second statement shall contain the information listed in Table V for the primary function of the appliance according to the determination required by Sections 1605(e) and 1605(f), and containing all other information shown in Table V for "all appliances." Each appliance type for which a statement is submitted must match all the common identifiers shown in Table V.

(2) Manufacturer Information

(A) The name, address, telephone number, and, if available, fax number, URL (web site) address, and e-mail address of the manufacturer.

(B) The name, address, telephone number, and, if available, fax number and e-mail address of the individual to contact concerning the statement pursuant to Section 1606(a)(4). There shall be only one individual to contact for each category (box) in the "Appliance" column of Table V, except that the individual may, during his or her absence, delegate his or her duties in this regard.

(C) The name, address, telephone number, and, if available, fax number and e-mail address of the person signing the declaration pursuant to Section 1606(a)(4).

(3) Testing and Performance Information.

(A) A statement that the appliance has been tested in accordance with all applicable requirements of Sections 1603 and 1604. If Section 1604 provides more than one test method that may be used, the manufacturer shall identify which method was used.

(B) The name and address and, if available, telephone number, fax number, URL (web site) address, and e-mail address of the laboratory or other institution where the testing required by Sections 1603 and 1604 was performed.

(C) For commercial refrigerators, commercial refrigerator-freezers, commercial freezers, large storage water heaters, and plumbing fittings, the test reports upon which the manufacturer relies in filing information pursuant to paragraph (D) immediately below.

(D) The applicable information listed in Table U; provided, however, that submittal of information marked with "I" is voluntary. Where there is text in the "Permissible Answers" column, the information provided must be one of the answers shown.

Exception: This subsection (D) does not apply to any water heater (1) that is within the scope of 42 U.S.C. sections 6292(a)(4) or 6311(1)(F), (2) that has a rated storage volume

of less than 20 gallons, and (3) for which there is no federal test method applicable to that type of water heater.

(E) How Tested Data Must Be Reported.

1. For any numerical value required by Table V that is produced by a test specified in Section 1604, the reported value shall be no higher for the value for which the consumer would prefer a high number, and no lower for the value for which the consumer would prefer a low number, than the values obtained by testing; unless different specific instructions are specified in the test method specified in Section 1604.

2. For any numerical value required by Table V that is produced by calculation from measured numerical test results, the reported value shall be no higher for the values where the consumer would prefer a high number than the exact result of the calculation, and no lower than the exact result of the calculation where the consumer would prefer a low number, than the values obtained by calculating, unless different specific instructions are specified in the test method specified in Section 1604.

3. Manufacturers may report:

a. numbers higher than tested values, where the consumer would, all other things being equal, prefer lower values (or is indifferent); and

b. numbers lower than tested values, where the consumer would, all other things being equal, prefer higher values (or is indifferent).

Example: An air conditioner is tested using the appropriate test method specified in Section 1604, and the test method does not include specific instructions about the precision of reporting.

- Cooling capacity is measured as: 36,014 Btu per hour.
- For cooling capacity, consumers prefer higher values.

- The manufacturer may not report any value over 36,014 Btu per hour.
- The manufacturer chooses to report 36,000 Btu per hour.
- Electrical energy use is measured at 3,487 watts.
- For electrical energy use, consumers prefer lower values.
- The manufacturer may not report any value under 3,487 watts.
- The manufacturer chooses to report 3,500 watts.
- Using the data the manufacturer chooses to report, EER = 36,000/3,500 = 10.285714.
- For EER, consumers prefer higher values.
- The manufacturer may not report any value of EER over 10.285714 (if EER is reported with only one decimal place, the maximum value would be 10.2).
- The manufacturer chooses to report EER = 10.2 Btu per watt hour.
- If the manufacturer had chosen to report the cooling capacity as 36,014 Btu per hour, and the electrical energy use as 3,487 watts, the calculated EER would have been 36,014/3,487 = 10.328076. In this case the manufacturer could not report any value of EER over 10.328076 (if EER is reported with only one decimal place, the maximum value would be 10.3).

Table V Data Submittal Requirements

[TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE]

(4) Declaration.

(A) Each statement shall include a declaration, executed under penalty of perjury of the laws of California, that (1) all the information provided in the statement is true, complete, accurate, and in compliance with all applicable provisions of

this Article; (2) if the statement is being filed electronically, that the requirements of Section 1606(g) have been and are being complied with; and (3) for appliances for which there is an energy efficiency, energy consumption, energy design, water efficiency, water consumption, or water design standard in Section 1605.1, 1605.2, or 1605.3, that the appliance complies with the applicable standards.

(B) If the manufacturer is a corporation, partnership, or other business entity, the declaration shall be signed by an individual authorized to make the declaration and file the statement on behalf of the business entity, and the declaration shall contain an affirmation that the individual signing is so authorized.

(C) The declaration shall be submitted and maintained as follows:

1. Statements filed on paper.

a. If the statement is filed by a manufacturer, then the manufacturer shall file a wet-signed paper declaration with the Executive Director and the Executive Director shall keep the declaration.

b. If the statement is filed by a third party under Section 1606(f), then the manufacturer shall file a wet-signed paper declaration with the third party and the third party shall keep the declaration and shall provide it to the Executive Director on request.

2. Statements filed electronically.

a. If the information is filed by a manufacturer, then either:

(i) the manufacturer shall file a wet-signed paper declaration with the Executive Director and the Executive Director shall keep the declaration;

(ii) if the Executive Director has approved the use of a unique digital identifier for this purpose, the manufacturer shall include in the statement a declaration digitally signed

under Government Code 16.5 and Title 2, California Code of Regulations, Division 7, Chapter 10 (beginning with Section 22000); or

(iii) the manufacturer shall execute a wet-signed paper declaration, electronically scan and copy the declaration, include the electronic copy of the declaration with the statement filed with the Executive Director, and keep the wet-signed paper declaration and provide it upon request to the Commission; and the Commission shall keep the electronic copy of the declaration.

b. If the information is filed by a third party under Section 1606(f), then either:

(i) the manufacturer shall file a wet-signed paper declaration with the third party and the third party shall keep the declaration and shall provide it to the Executive Director on request;

(ii) if the Executive Director has approved the use of a unique digital identifier for this purpose, the manufacturer shall execute a declaration digitally signed under Government Code 16.5 and Title 2, California Code of Regulations, Division 7, Chapter 10 (beginning with Section 22000), and provide the electronic declaration to the third party; and the third party shall keep a copy of the electronic declaration and shall provide it to the Executive Director on request; or

(iii) the manufacturer shall execute a wet-signed paper declaration, electronically scan and copy the declaration, include both the wet-signed paper declaration and the electronic copy of the declaration with the electronic information provided to the third party; the third party shall include the electronic copy with information filed with the Executive Director, shall keep an electronic copy, and shall provide the wet-signed paper declaration to the Executive Director upon request; and the Executive Director shall keep a copy of the electronic declaration.

(b) Review of Statements by the Executive Director.

In this subsection, "manufacturer" also includes a third party filing a statement under Section 1606(f).

(1) Determination. The Executive Director shall determine whether a statement is complete, accurate, and in compliance with all applicable provisions of this Article, and whether the appliance for which the statement was submitted complies with all applicable standards in Sections 1605.1, 1605.2, and 1605.3.

(2) Informing Manufacturer of Determination.

(A) The Executive Director shall inform the manufacturer of the determination within these time limits:

through February 28, 2004: if the statement was filed electronically, within 30 calendar days after receipt by the Executive Director; if the statement was filed on paper, within 45 calendar days after receipt by the Executive Director; and

beginning March 1, 2004: if the statement was filed electronically, within 14 calendar days after receipt by the Executive Director; if the statement was filed on paper, within 21 calendar days after receipt by the Executive Director.

(B) The Executive Director's determination shall be sent to the manufacturer electronically if the statement was filed electronically and either electronically or on paper if the statement was filed on paper.

(3) Nature of Determination.

(A) Statement is Incomplete. If the Executive Director determines that a statement is not complete, or that the statement does not contain enough information to determine whether it is accurate or whether the appliance complies with an applicable standard, the Executive Director shall return the statement to the manufacturer with an explanation of its defects and a request for any necessary additional information. The manufacturer shall refile the statement with

all information requested by the Executive Director and with any other information it wants to file. The Executive Director shall review the refiled statement according to the time limits in Section 1606(b)(2).

(B) Statement is Inaccurate or Appliance Does Not Comply. If the Executive Director determines that the statement is inaccurate or that the appliance does not comply with an applicable standard, the Executive Director shall reject the statement and return it to the manufacturer with an explanation of its defects. The manufacturer may submit another statement for the appliance at any time.

(C) Statement is Complete and Accurate and Appliance Complies. If the Executive Director determines that the statement is complete and accurate and that the appliance complies with all applicable standards, the Executive Director shall immediately include the appliance in the database and shall so inform the manufacturer. (Section 1608(a) states that no appliance within the scope of these regulations may be sold or offered for sale in California unless the appliance is in the database.)

(c) Database of Appliance Models.

(1 Creation of Database. The Executive Director shall maintain a paper or electronic database. The database shall consist of two parts:

(A) "Active Database." The active database shall contain, at least, information on all appliances that are currently in production, for which complete and accurate statements have been received pursuant to Section 1606(a), and that have not been removed from the database pursuant to Sections 1606(d)-(h), or 1608(b)-(e).

(B) "Historical Database." The historical database shall contain, at least, information on all appliances that (1) are no longer in production, for which complete and accurate statements have been received pursuant to Section 1606(a) or

(2) all appliances that have been removed from the active database pursuant to Sections 1606(d)-(h), Section 1608(b), or 1608(c).

(2) Status of Database. The database is the directory published by the Commission within the meaning of Title 24, California Code of Regulations, Part 6, Subchapter 1, Section 100(g). The database in existence on the effective date of this paragraph is the directory referred to in this paragraph, until that existing database is modified by the Executive Director pursuant to this Article.

(3) Annual Confirmation of Database Listings. At least annually the Executive Director shall, by writing to the most recent address filed pursuant to Section 1606(a)(2)(B), request each manufacturer of an appliance listed in the database to confirm the validity, or to correct in compliance with this Article, all of the information in each of its database listings, including but not limited to the appliance's compliance with any applicable standard adopted since the most recent filing by the manufacturer. If, within 30 days after the mailing, there is any appliance for which the Executive Director has not received a reply from the manufacturer that confirms the validity of, or corrects, all of the information in the database listing, the Executive Director shall write via certified mail, to the same address. If within 30 days of the latter mailing there is no such reply, the appliance shall be removed from the database and moved into the Historical Database, and it may be presumed that the appliance is no longer in production.

(d) Assessment of Completeness, Accuracy, and Compliance of Manufacturer Statements. Notwithstanding any other provision of these regulations, the Executive Director may at any time challenge the completeness, accuracy, and compliance with the requirements of this Article, of any statement or confirmation filed pursuant to this Section. If the statement is incomplete or inaccurate, or if the Executive Director determines that the statement otherwise fails to comply with

any of the requirements of this Article, then he or she shall, ten days after providing written notice by certified mail to the person designated in Section 1606(a)(2)(B), remove the appliance from the database described in Section 1606(c).

(e) Modified and Discontinued Appliances.

(1) If any of the characteristics listed in Table U are changed, the manufacturer shall file a statement containing the identifiers listed in Table U for the appliance and updated information for all of the characteristics that have been changed. Upon receipt of such a statement, the Executive Director shall review the statement under Section 1606(b). If the statement is complete, accurate, in compliance with all applicable standards, the Executive Director shall modify the database accordingly.

(2) After any appliance has ceased being sold or offered for sale in California the manufacturer shall file a statement so stating and containing the Identifiers listed in Table U for the appliance. Upon receipt of such a statement, the Executive Director shall review the statement under Section 1606(b). If the statement is complete, accurate, and in compliance with all applicable provisions of this Article, the Executive Director shall move the appliance from the Active Database to the Historical Database.

(f) Filing by Third Parties.

(1) A third party may file on behalf of a manufacturer the information required by Sections 1606(a)(2), 1606(a)(3), 1606(a)(4), 1606(c)(3), or 1606(e) if:

(A) before or with its first submittal, and at least annually thereafter, the third party submits to the Executive Director, under penalty of perjury, persuasive evidence that:

1. the third party has read and understood all the provisions of this Article, of federal law, and of all other documents applicable to each appliance category in Subsections (a)-(t) of

Section 1601 for which the third party will file information; and

2. the third party is financially and technically capable of complying with the applicable provisions of this Article;

(B) the manufacturer submits to the third party:

1. the information that is required;

2. a declaration under penalty of perjury, and where applicable pursuant to Section 1606(a)(4)(B),

a. that the information is true, complete, accurate, and in compliance with all applicable provisions of this Article, and,

b. for appliances for which there is an energy efficiency or energy design standard in Section 1605.1, 1605.2, or 1605.3, that the model complies with the applicable standards; and

3. an authorization, filed with both the third party and the Commission, for the third party to submit the information to the Commission on behalf of the manufacturer.

(C) the third party submits to the Executive Director, in compliance with the requirements of this Article applicable to manufacturer-filed submittals:

1. the information that is required; and

2. a declaration under penalty of perjury, and where applicable pursuant to Section 1606(a)(4)(B), that:

a. to the best of the third party's knowledge and belief, the information submitted to the Commission is the same as the information submitted by the manufacturer to the third party; the information is true, complete, accurate, and in compliance with all applicable provisions of this Article; and, for appliances for which there is an energy efficiency, energy design, water consumption, or water efficiency standard in Section 1605. 1, 1605.2, or 1605.3, the appliance complies with the applicable standards; and

b. the requirements of Sections 1606(f)(1) are met;

(D) the third party has an agreement with the manufacturer that allows the third party to challenge the truth, accuracy, and completeness of information submitted by the manufacturer to the third party, and to refuse to submit to the Commission information that the third party believes is not truthful, accurate, or complete; and

(E) the third party provides, upon ten days' written notice from the Executive Director, all information provided by the manufacturer and all information relating to any challenges pursuant to Section 1606(f)(1)(D).

(2) Whether a manufacturer files information required by this Section by itself or via a third party, the manufacturer remains responsible for the truth, accuracy, completeness, and timeliness of all required filings.

(3) At any time the Executive Director may forbid a third party from making filings for a specified time, allow reinstatement subject to appropriate conditions, and remove affected appliances from the database, if he or she finds that there is noncompliance with an applicable provision of this Article.

(4) The provisions of this Article are applicable to all submittals and filings, whether made by a manufacturer directly or by a third party on behalf of a manufacturer.

(g) Electronic Filing.

(1) Unless otherwise stated in this Article, the statements and other submittals required or allowed by this Article shall be filed electronically by all third parties acting under Section 1606(f) so that:

(A) the electronic filing uses a format and characteristics, including without limitation appropriate formatting, that are specified by the Executive Director, and includes a declaration that complies with Section 1606(a)(4);

(B) within three days of the electronic filing being made, an exact paper copy of all declarations required by Sections 1606(a)(4) or 1606(f)(1)(C)(ii) is executed by a person authorized under the appropriate section to execute it;

(C) for two years from the date of filing the person making the filing keeps the exact paper copies required by paragraph (B) immediately above and provides those copies to the Executive Director upon 10 days' written request.

(2) Any electronic filing constitutes a representation by the person making the filing that:

(A) all applicable requirements of this Article have been met;

(B) the person will electronically acknowledge receipt of all electronic communications concerning the filing from the Executive Director to the person;

(C) all electronic communications concerning the filing from the Executive Director to the person shall be deemed received by the person upon notification to the Executive Director, by the computer from which the Executive Director communication has been sent, that the communication has been sent; and

(D) all electronic communications concerning the filing from the person to the Executive Director shall be deemed received by the Executive Director only upon actual receipt.

(3) At any time the Executive Director may forbid electronic filings by any person, or generically, and may remove affected appliance models from the database, if he or she finds that an applicable requirement of this Article is not being met.

(h) Trade Association Directories.

(1) A paper or electronic directory, or a part thereof, published by an appliance trade association may be used for any purpose that the database established pursuant to Section

1606(c) is used for, if the Executive Director approves the directory, or part thereof, by determining and confirming that:

(A) the trade association is an approved industry certification program for each appliance listed in the directory;

(B) all of the applicable requirements of Section 1606(f) for third party submittals are met for the directory;

(C) the entity submits to the Executive Director:

1. all of the information in the directory, within one working day of the approval of the directory;

2. all of the information in the directory that has changed since the previous submittal, at the end of each week during which there has been any change;

3. a declaration, signed under penalty of perjury of the laws of California, that to the best of the trade association's knowledge and belief:

a. the information in the directory is the same as the information submitted by manufacturers to the trade association;

b. the information is true, complete, accurate, and in compliance with all applicable provisions of this Article;

c. each appliance complies with the applicable standards in Section 1605.1; and

d. or any appliance for which there is a standard in Section 1605. 2 or Section 1605.3, that the appliance meets all applicable standards unless the directory states, in a format approved by the Executive Director (including without limitation font, type size, and placement in the directory), that it is illegal in California to sell the appliance or offer it for sale.

(D) for each appliance that is listed in a trade association directory, the directory includes all of the following information, where applicable to the appliance:

manufacturer brand model number as it appears on the appliance type fuel type voltage electrical phase capacity or other size measurement input output standby consumption, loss, or other similar measurement; and energy efficiency, energy consumption,water efficiency, or water consumption;

(E) the directory contains no appliance in the following categories:

1. an appliance that fails to meet an applicable energy efficiency, energy consumption, energy design, water efficiency, or water consumption standard established in or pursuant to NAECA or EPAct;

2. an appliance for which the manufacturer has stated or certified that the appliance meets an energy efficiency, energy consumption, energy design, water efficiency, or water consumption standard not applicable to it; or

3. an appliance that does not, or an appliance whose manufacturer does not, meet an applicable requirement of this Article, unless the directory states, in a format approved by the Executive Director (including without limitation font, type size, and placement in the directory), that it is illegal in California to sell the appliance or offer it for sale; and

(F) each directory contains the following statement, in at least 20 point bolded type and on the front cover or first page, or in another format and with other characteristics as specified by the Executive Director:

"This directory [insert parts if appropriate] has been approved by the California Energy Commission (Commission) for determining compliance with its appliance efficiency regulations (Title 20, California Code of Regulations, Sections 1601-1608) and its building standards (Title 24, California Code of Regulations, Part 6). UNLESS INDICATED OTHERWISE, any appliance listed in this directory [insert parts if appropriate] may be sold, offered for sale, or installed in new construction in California. For

appliances manufactured by manufacturers participating in this directory, but who have not given authorization for data submittal to the Commission, this directory cannot be used for determining compliance. For information about such appliances, appliances that are beyond the scope of this directory, or appliances produced by manufacturers who do not participate in this directory, please contact the Commission's Building Standards Hotline at 916-654-5106, 800-772-3300 (in California only), or <eehomes@energy.state.ca.us>. Manufacturers not granting authorization for data submittal to the Commission as of the publication date of this directory include [list all affected manufacturers]"; and

(G) at the end of each calendar quarter, the trade association mails, at no cost to recipients, a paper copy of the current directory or supplement or part thereof to the Executive Director and to all California building officials as specified by the Executive Director, and provides to the Executive Director a list of the building officials to whom the directory or supplement was sent.

(2) If the Executive Director at any time determines that an approved trade association directory does not comply with an applicable provision of this Article, or that any information in a trade association directory is substantially incomplete, inaccurate, or not in compliance with an applicable provision of this Article, then:

(A) upon written notice from the Executive Director the trade association shall immediately indicate in the directory, in a format approved by the Executive Director (including without limitation font, type size, and placement in the directory), that it is illegal in California to sell the appliance. In addition, the Executive Director shall remove the appliance from the Commission's database established under Section 1606(c) or indicate in the database that the appliance cannot legally be sold or offered for sale in California. The appliance shall be removed from, or indicated in, the Commission's database and the trade association directory, for at least sixty days,

until the end of a proceeding held to consider the matter pursuant to Sections 11445.10-11445.60 of the California Government Code (or, at the third party or affected manufacturer's option, pursuant to Sections 11425.10-11425.60 of the California Government Code); and

(B) the Executive Director may suspend or revoke the approval of the trade association directory; if approval is revoked, the trade association may not seek re-approval for two years after the revocation.

(3) If the Executive Director takes action under Sections 1606(b)(3)(A) or (B), or 1608(c), (d), or (e), he or she shall direct that all trade association directories be modified accordingly.

(4) There may be more than one third-party directory for the same appliance.

(i) Retention of Records

Manufacturers, and third parties or trade associations acting under Sections 1606(a), 1606(f), and 1606(g), shall retain all data, forms, information, and all other records required by this Article concerning each appliance (1) for at least 2 years after the manufacturer informs the Executive Director, in writing, of the cessation of production of the appliance; and (2) in a manner allowing ready access by the Executive Director on request. The Executive Director shall retain all data, forms, information, and all other records required by this Article concerning each appliance for at least 10 years after the record is initially filed or reconfirmed.

Cal. Code Regs. tit. 20, § 1607. Marking of Appliances.

(a) Scope of this Section.

Every unit of every appliance within the scope of Section 1601 shall comply with the applicable provisions of this Section. The effective dates of this section shall be the same as the effective dates shown in Section 1605.1, 1605.2 or 1605.3 for appliances for which there is an energy efficiency, energy consumption, energy design, water efficiency, water consumption, or water design standard in Section 1605.1, 1605.2, or 1605.3. For appliances with no energy efficiency, energy consumption, energy design, water efficiency, water consumption, or water design standard in Section 1605.1, 1605.2, or 1605.3, the effective date of this section shall be January 1, 2006.

(b) Name, Model Number, and Date.

Except as provided in subsection (c), the following information shall be permanently, legibly, and conspicuously displayed on an accessible place on each unit;

(1) manufacturer's name or brand name or trademark;

(2) model number; and

(3) date of manufacture, indicating (i) year and (ii) month or smaller (e.g. week) increment. If the date is in a code that is not readily understandable to the layperson, the manufacturer shall immediately, on request, provide the code to the Energy Commission.

(c) Exceptions to Subsection (b).

(1) For plumbing fixtures and plumbing fittings, the information required by subsection (b) shall be permanently, legibly, and conspicuously displayed on an accessible place on each unit or on the unit's packaging.

(2) For lamps, the information required by subsection (b) shall be permanently, legibly, and conspicuously displayed on

an accessible place on each unit, on the unit's packaging, or, where the unit is contained in a group of several units in a single package, on the packaging of the group.

(3) For fluorescent lamp ballasts, the date of manufacture information required by section 1607(b)(3) shall indicate (i) year and (ii) three-month or smaller increment. If the date is in a code that is not readily understandable to the layperson, the manufacturer shall immediately, on request, provide the code to the Energy Commission.

(d) Energy Performance Information.

(1) Federally-Regulated Consumer Products.

The marking required by 16 CFR Part 305 (2004) shall be displayed on all units of all federally-regulated consumer products of the following classes:

Refrigerators Refrigerator-freezers Freezers Central air conditioners Heat pumps Dishwashers Water heaters Room air conditioners Warm air furnaces Pool heaters Clothes washers Clothes dryers Fluorescent lamp ballasts Shower-heads Faucets Water closets Urinals General service fluorescent lamps Incandescent reflector lamps Direct heating equipment Medium-base compact fluorescent lamps Cooking equipment (kitchen ranges and ovens).

(2) Federally-Regulated Commercial and Industrial Equipment: Each unit of an appliance listed in Table W that is federally-regulated commercial and industrial equipment shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, with the applicable energy performance information shown in Table W, and such information shall also be included on all printed material that is displayed or distributed at the point of sale.

Table W Requirements for Marking of Federally-Regulated Commercial and Industrial Equipment

Class	Energy Performance Information
Split system central air conditioners (on printed material only)	Cooling capacity, SEER, EER
Single package central air conditioners	Cooling capacity, SEER, EER
Split system heat pumps (on printed material only)	Cooling capacity, heating capacity, SEER, EER, HSPF, COP
Single package heat pumps	Cooling capacity, heating capacity, SEER, EER, HSPF, COP
Package terminal air conditioners	Cooling capacity, EER
Package terminal heat pumps	Cooling capacity, heating capacity, EER, COP
Warm air furnaces	Input rating, thermal efficiency
Packaged boilers	Input rating, thermal efficiency, combustion efficiency
Water heaters	Input rating, rated storage volume, measured storage volume, thermal efficiency, standby loss (%/hr), standby loss (Btu/hr)

Hot water supply boilers	Rated input, rated storage volume, measured storage volume, thermal efficiency, standby loss

(3) Air Conditioners, Heat Pumps, Furnaces, Boilers, and Water Heaters. Each unit of air conditioners, heat pumps, furnaces, boilers, and water heaters that are not subject to NAECA and that comply with the October 29, 2001 provisions in Tables 6.2.1 A through G of ASHRAE/IESNA Standard 90.1-1999 shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, with a statement that the equipment complies with the 2001 requirements of ASHRAE Standard 90.1. Each unit of other air conditioners, heat pumps, furnaces, boilers, and water heaters that are not subject to NAECA and that comply with the October 29, 1999 provisions (but not with the October 29, 2001 provisions) in Tables 6.2.1 A through G shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, with a statement that the equipment complies with the 1999 requirements of ASHRAE Standard 90.1.

(4) Distribution Transformers. Each unit of distribution transformers shall comply with the labeling requirements of NEMA Standard TP3-2000.

(5) Illuminated Exit Signs. Each unit of illuminated exit signs meeting the criteria of Section 1605.3(l) that are sold in California (subject to the limitations of Section 1601) shall be marked by the manufacturer with a block E inside a circle; the mark commonly referred to as "Circle E." The size of the mark shall be commensurate with other markings on the sign, but not smaller than ¼". Signs not meeting 1605.3(l) shall not be so marked.

(6) Luminaires. Each unit of torchieres and each package containing a torchiere shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, in characters no less than 1/8" on the inner surface of the reflector bowl of the torchiere, and 1/4" on the packaging, "LAMPS MUST BE NO MORE THAN 190 WATTS."

(7) Ceiling Fans. Each package containing a ceiling fan whose diameter exceeds 50 inches shall be marked, permanently and legibly on an accessible and conspicuous place on the unit's packaging, in characters no less than ¼", the unit's airflow at high, medium, and low speed in CFM, and the unit's air flow efficiency in CFM/Watt at high, medium and low speed.

(8) Commercial Pre-Rinse Spray Valves. Each unit of commercial pre-rinse spray valve shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, in characters no less than 1/8", the flow rate of the unit, in gallons-per minute (gpm) at 60 psi.

(9) External Power Supplies.

(i) Each power supply shall be marked on its nameplate with the appropriate numeral, specified below, if it meets or exceeds both the no-load and average active mode efficiency requirements associated with that numeral as specified below, at each test voltage and frequency value marked on its nameplate, when tested in accordance with the test method in Section 1604(u)(1).

a. "III" for those models certified under Section 1606 as complying with the standards effective January 1, 2006 in Table U-1 of this Article, but not as complying with the standards effective January 1, 2008 in Table U-2 of this Article.

~~b.~~ "IV" for those models certified under Section 1606 as complying with the standards effective January 1, 2008 in Table U-2 of this Article.

(ii) The mark shall comply with the following:

a. Format. Roman numeral: III or IV.

b. Font. Preferred Times Roman (or other plain serif fonts).

c. Size. Legible.

d. Color. Text to contrast with the nameplate background

e. Permanence. Indelible.

(10) Residential Pool Pumps.

(i) Each residential pool pump shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, in characters no less than 1/4", the rated horsepower of the pump.

(ii) Each residential pool pump motor shall be marked, permanently and legibly on an accessible and conspicuous place on the unit, in characters no less than 1/4", the total horsepower of the motor.

The following standards are incorporated by reference in Section 1607.

Number	Title
FEDERAL MARKING REQUIREMENTS CFR, Title 16, Part 305 (2004)	

Copies available from: Superintendent of Documents
U.S. Government Printing Office
Washington, D.C. 20402
www.access.gpo.gov/nara/cfr

AMERICAN SOCIETY OF HEATING, REFRIGERATING AND AIR-CONDITIONING ENGINEERS (ASHRAE)

ANSI/ASHRAE 90.1-1999	Energy Standard for Buildings Except Low-Rise Residential Buildings

Copies available from:

American Society of Heating, Refrigerating and Air-Conditioning Engineers
1791 Tullie Circle N.E.
Atlanta, GA 30329
www.ashrae.org
Phone: (800) 527-4723 (U.S./ Canada) or (404) 636-8400
FAX: (404) 321-5478

NATIONAL ELECTRIC MANUFACTURERS ASSOCIATION (NEMA)

NEMA TP3-2000	Standard for the Labeling of Distribution Transformer Efficiency

Copies available from:

National Electric Manufacturers Association
1300 N. 17th Street,
Suite 1847
Rosslyn, VA 22209
www.nema.org
Phone: (703) 841-3200
FAX: (703) 841-3300

Cal. Code Regs. tit. 20, § 1608. Compliance, Enforcement, and General Administrative Matters.

(a) General Requirements for the Sale or Installation of All Appliances. Any unit of any appliance within the scope of Section 1601 may be sold or offered for sale in California only if:

(1) the appliance appears in the most recent database established pursuant to Section 1606(c), unless the only reason for the appliance's absence from the database is its failure to comply with an applicable standard in Section 1605.1;

(2) the manufacturer has:

(A) tested the appliance as required by Sections 1603 and 1604;

(B) marked the unit as required by Section 1607;

(C) for any appliance for which there is an applicable standard in Section 1605.2 or 1605.3, certified under Section 1606(a) that the appliance complies with the standard;

(3) the unit has the same components, design characteristics, and all other features that affect energy or water consumption or energy or water efficiency, as applicable, as the units that were tested under Sections 1603 and 1604 and for which information was submitted under Section 1606(a); and

(4) for any appliance for which there is an applicable standard in Section 1605.2 or 1605.3, the unit complies with the standard.

Exceptions: Subsections 1608(a)(1) and 1608(a)(2)(c) are not applicable to: 1. torchieres, and 2. non-commercial cooking products until, as determined by the Executive Director, there takes effect a federal standard or a federal reporting requirement for annual cooking energy consumption or for a similar measure of energy performance, and 3. power

supplies, and 4. consumer audio and video equipment, and 5. refrigerators without doors and freezers without doors that are not specifically designed for display and sale of bottled or canned beverages, and 6. walk-in refrigerators and walk-in freezers, and 7. under-cabinet luminaires, and 8. low-profile ceiling fans.

(b) Appliances Not in Database.

If the Executive Director determines that an appliance that is not in the database is being sold or offered for sale in California, he or she shall take appropriate legal action to restrain and discourage such sale or offering, including, but not limited to testing units of the appliance at the manufacturer's cost and seeking appropriate judicial action.

(c) All Appliances: Submittal of Reports of Manufacturers' Certification Testing.

(1) For any appliance, the Executive Director may at any time request from a manufacturer a copy of the test report that describes the results of the testing that was performed pursuant to Section 1604 and that provides the basis for the information submitted under Section 1606(a)(3)(D). The request shall be sent to the address or e-mail address designated in Section 1606(a)(2)(B). If the appliance is a commercial refrigerator, commercial refrigerator-freezer, commercial freezer, large storage water heater, or plumbing fitting, or if the Executive Director includes with the request information that, in his or her opinion, constitutes substantial evidence that the appliance or the manufacturer is not in compliance with an applicable provision of this Article, or that the energy or water performance of the appliance is not as certified under Section 1606(a)(3)(D) or is not as required by an applicable standard in Section 1605.1, 1605.2, or 1605.3, then the manufacturer shall provide a copy of the applicable test report to the Executive Director within 5 days of the manufacturer's receipt of the request.

(2) If the Executive Director does not receive the test report within the required time, the Executive Director shall remove the appliance from the database.

(3) If the test report indicates that the energy or water consumption of the appliance is greater than, or the energy or water efficiency of the appliance is less than, the consumption or efficiency certified by the manufacturer pursuant to Section 1606(a)(3)(D), the Executive Director shall, after providing written notice by certified mail to the person designated in Section 1606(a)(2)(B), modify the listing of the appliance in the database to reflect accurately the test report.

(4) If the test report indicates that the appliance model does not comply with an applicable standard in Section 1605.1, 1605.2, or 1605.3, the Executive Director shall, ten days after providing written notice by certified mail to the person designated in Section 1606(a)(2)(B), remove the model from the database.

(d) Inspection by the Executive Director of Appliances Subject to Energy Design and Water Design Standards, and Marking Requirements.

(1) The Executive Director shall periodically inspect appliances sold or offered for sale in the state, to determine whether they conform with the applicable energy design and water design standards of Sections 1605.1, 1605.2, and 1605.3, and with the applicable marking requirements of Section 1607.

(2) Inspection of an appliance shall consist of inspection of one unit.

(A) If the inspection indicates that the unit complies with the applicable energy or water design standards and marking requirements, the matter shall be closed.

(B) If the inspection indicates that the unit does not comply with an applicable energy or water design standard or as applicable marking requirement, the Commission shall

undertake a proceeding pursuant to Sections 11445.10-11445.60 of the California Government Code (or, at the manufacturer's option, pursuant to Sections 11425.10-11425.60 of the California Government Code). If the Commission confirms the Executive Director's determination, then he or she shall remove the appliance from the database.

(e) Executive Director's Enforcement Testing of Appliances Subject to Energy Efficiency, Energy Consumption, Water Efficiency, and Water Consumption Standards.

The Executive Director shall periodically cause, at laboratories meeting the criteria of Section 1603(a), the testing of appliance units sold or offered for sale in the state, to determine whether the appliances conform with the applicable standards in Sections 1605.1, 1605.2, and 1605.3, and to determine whether their performance is as reported or certified by the manufacturer pursuant to Section 1606(a). Within ten working days of receipt of a request from any person that such testing be done, the Executive Director shall inform the person of the estimated cost of the testing. Testing shall be performed as follows:

(1) Initial Test. The Executive Director shall perform an initial test on one unit, using the applicable test procedure specified in Section 1604. Upon completion of the initial test, the Executive Director shall make a determination as follows:

(A) Performance Is No Worse Than Required by Standards and Is No Worse Than as Certified by Manufacturer. If the initial test result indicates that the energy and water consumption of the unit is no greater than, and the energy and water efficiency of the unit is no less than, the consumption or efficiency that is permitted and required by all applicable standards in Section 1605.1, 1605.2, or 1605.3, and that was certified by the manufacturer pursuant to Section 1606(a), the matter shall be closed.

(B) Performance Is Worse Than Required by Standard or Is Worse Than as Certified by Manufacturer. If the initial test

result indicates that the energy or water consumption of the unit is greater, or the energy or water efficiency of the unit is less, than the consumption or efficiency that is permitted or required by any applicable standard in Section 1605.1, 1605.2, or 1605.3, or that was certified by the manufacturer pursuant to Section 1606(a), the Executive Director shall perform a second test on a second unit, using the applicable test procedure specified in Section 1604.

(2) Second Test; Mean of Results. If a second test is performed, the Executive Director shall calculate the mean of the results of the initial test and the second test. Upon completion of the second test, the Executive Director shall inform the manufacturer of the results and shall make a determination as follows:

(A) Performance Is No Worse Than Required by Standards and Is No Worse Than as Certified by Manufacturer. If the two test results indicate that the mean energy and water consumption of the two units is no greater than, and the mean energy and water efficiency of the two units is no less than, the consumption and efficiency permitted or required by all applicable standards in Section 1605.1, 1605.2, or 1605.3, and that was certified by the manufacturer pursuant to Section 1606(a), the matter shall be closed.

(B) Performance is As Required by Standard but is Worse Than as Certified by Manufacturer. If the two test results indicate that the mean energy or water consumption of the two units is greater than, or the mean energy or water efficiency of the two units is less than, the consumption or efficiency that was certified by the manufacturer pursuant to Section 1606(a), but that the mean result nevertheless complies with all applicable standards in Section 1605.1, 1605.2, or 1605.3, the Commission shall undertake a proceeding pursuant to Sections 11445.10-11445.60 of the California Government Code (or, at the manufacturer's option, pursuant to Sections 11425.10-11425.60 of the California Government Code). If the Commission determines

that the two test results indicate that (1) the mean energy or water consumption of the two units is greater than, or the mean energy or water efficiency of the two units is less than, the consumption or efficiency as reported or certified by the manufacturer pursuant to Section 1606(a), and (2) the mean result nevertheless complies with all applicable standards in Section 1605.1, 1605.2, or 1605.3, then the Executive Director shall modify the listing of the appliance in the database to reflect accurately the Commission's determination.

(C) Performance is Not As Required by Standard. If the two test results indicate that the mean energy or water consumption of the two units is greater than, or the mean energy or water efficiency of the two units is less than, any applicable standard in Section 1605.1, 1605.2, or 1605.3, the Commission shall undertake a proceeding pursuant to Sections 11445.10-11445.60 of the California Government Code (or, at the manufacturer's option, Sections 11425.10-11425.60 of the California Government Code). If the Commission determines that the mean energy or water consumption of the two units is greater than, or the mean energy or water efficiency of the two units is less than any applicable standard, the Executive Director shall remove the appliance from the database established pursuant to Section 1606(c).

(3) Optional Method of Determining Energy or Water Performance. If, at any time before a Commission determination under Section 1608(d)(2)(B) or 1608(e)(2)(C), the manufacturer so chooses, instead of using the mean-of-two-units approach set forth in Sections 1608(e)(1) and 1608(e)(2), the Executive Director shall test the appliance using the sampling method set forth in 10 CFR Part 430, Appendix B to Subpart F (2004), and shall make the determinations under Sections 1608(e)(1) and 1608(e)(2) based on those test results. The manufacturer shall pay for all such testing.

(f) Costs.

Except as otherwise provided in this Article, all costs of initial tests showing results as described in Section 1608(d)(2)(A) shall be borne by the Commission. All costs of all other tests shall be paid by the manufacturer.

(g) Federally-Regulated Appliances.

If:

(1) the appliance tested is a federally-regulated consumer product or federally-regulated commercial and industrial equipment; and

(2) either:

(A) the test results show that the appliance does not comply with an applicable federal standard or other applicable federal requirement; or

(B) the test results are at variance with the results reported by the manufacturer to the U.S. Department of Energy or the U.S. Federal Trade Commission; then, in addition to taking the applicable actions described in Sections 1608(e)(1) and 1608(e)(2), the Executive Director shall inform the appropriate federal agency.

(h) Forms and Formats Specified by Executive Director.

The Executive Director may specify, and require the use of, any particular form or format for the submittal of any data, reports, or other information required by this Article, including but not limited to computer programs or formats.

(i) Executive Director Determinations.

Whenever this Article refers to a finding, conclusion, or other determination by the Executive Director, any person seeking such a determination shall submit to the Executive Director a written request. Within 10 days of receipt of a request, the Executive Director shall either find the request is complete and so inform the applicant, or return the request to the

applicant with a statement of what additional information is necessary to make it complete. Within 21 days of receipt of a complete request, the Executive Director shall make a determination, which shall be within the discretion of the Executive Director acting on the basis of the entire record, which shall be assembled and made publicly available by the Executive Director. Within 10 days of a determination, whether made in response to a request or made on the Executive Director's own initiative, any affected person, including but not limited to the person, if any, who made a request for the determination, may appeal the determination to the Commission in writing. At the same time that the appeal is filed, the appellant shall file all the evidence the appellant wishes the Commission to consider. The Commission Staff and any affected person shall file all the evidence they wish the Commission to consider within 20 days after the appeal is filed. The Commission shall hear and decide the appeal at the next regularly-scheduled business meeting that is at least 30 days after the appeal is filed. At the hearing the Commission may require the filed evidence to be presented under oath and may allow questions and cross-examination from participants.

The following standards are incorporated by reference in Section 1608.

Number	Title
FEDERAL SAMPLING METHOD	
CFR, Title 10, Part 430, Appendix B to Subpart F (2004)	

Copies available from: Superintendent of Documents
U.S. Government Printing Office
Washington, DC 20402
www.access.gpo.gov/nara/cfr

Supreme Court, U.S.
FILED
OCT 14 2005
OFFICE OF THE CLERK

No. 05-331

In The Supreme Court of the United States

AIR CONDITIONING & REFRIGERATION INSTITUTE, *et al.*,

Petitioners,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM M. CHAMBERLAIN*
JONATHAN HUGHES BLEES
MONICA A. SCHWEBS
WILLIAM STAACK
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
1516 Ninth Street
Sacramento, California 95814
916-654-3951
Counsel for Respondents

**Counsel of Record*

October 14, 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly held that 42 U.S.C. § 6297(a)(1) does not preempt state regulations that require appliance manufacturers to submit data to a state agency and to mark appliances with certain information, because data submitted to a government agency rather than presented to consumers at the point of sale or use does not constitute "disclosure of information," and the required information for marking is not a "measure of energy consumption" that is "other than" that required by federal law, as those terms are used in § 6297(a)(1).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
STATEMENT	1
REASONS FOR DENYING THE PETITION	3
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375 (1983) 7

Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919) 7

Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) 10, 11

Hawkins v. Leslie's Pool Mart, Inc., 184 F.3d 244 (3d Cir. 1999) 10

Maryland v. Louisiana, 451 U.S. 725 (1981) 7

United States v. Locke, 529 U.S. 89 (2000) 6, 7

Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635 (2002) 1

FEDERAL STATUTES, REGULATIONS, AND RULES

42 U.S.C.

§§ 6293-95 2

§ 6294 8

§ 6296 ..... 8, 9

§ 6297(a)(1) ..... *passim*

§ 6297(b)-(c) 9

§ 6297(e) 9

§ 6297(f) 9

§§ 6313-15 2

§ 7543 10

TABLE OF AUTHORITIES – Continued

Page

Pub. L. No. 94-163, 89 Stat. 871 (1975) 2, 4
Pub. L. No. 95-619, 92 Stat. 3206 (1978) 2
Pub. L. No. 100-12, 101 Stat. 103 (1987) 2
Pub. L. No. 102-486, 106 Stat. 2776 (1992) 2
Pub. L. No. 109-58, 119 Stat. 594 (2005) 2
10 C.F.R. § 430.62 9
16 C.F.R. § 305.15 9
69 Fed. Reg. 61,916 (Oct. 21, 2004) 10
54 Fed. Reg. 28,031 (July 5, 1989) 9
Sup. Ct. R. 10 5

CALIFORNIA STATUTES AND REGULATIONS

Cal. Pub. Res. Code

§§ 25000-25986 1
§ 25402(a)-(c) 1

Cal. Pub. Util. Code

§ 399(c)(3) 7
§ 701.1(a) 7

Cal. Code Regs. tit. 20

§ 1601 5
§ 1602 5
§ 1603 5
§§ 1603-04 1
§ 1604 9

TABLE OF AUTHORITIES – Continued

Page

§§ 1605-1605.3 1

§ 1605.3 5

§ 1606 ..... 1, 5, 9

§ 1607 ..... 1, 5, 10

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Energy Resources Conservation and Development Commission of the State of California ("Commission"), and the individual Commissioners thereof, respectfully request that this Court deny the petition.[1]

STATEMENT

1. Created in 1974, the Commission is California's primary energy policy and planning agency. *See* Cal. Pub. Res. Code §§ 25000-25986. The Commission's duties include promoting energy efficiency through appliance and building standards. *Id.* § 25402(a)-(c). The Commission's appliance regulations have four substantive requirements:

> test methods that measure the energy performance of appliances, 20 Cal. Code Regs. tit. 20, §§ 1603-04;
>
> efficiency standards that regulate how much energy appliances may use, *id.* §§ 1605-1605.3;
>
> data-submittal by manufacturers, *id.* § 1606 & tbl.V[2]; and
>
> marking of appliances, *id.* § 1607.

---

[1] In filing this Brief in Opposition, the Commission itself, as opposed to the Commissioners sued in their official capacities, does not waive its sovereign immunity under the Eleventh Amendment. *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002).

[2] In the opinions below, Table V is referred to as "Table U"; its designation was subsequently amended.

Petitioners here challenge only the data-submittal and marking regulations.

The Commission first adopted data-submittal regulations in 1977. Since then, appliance manufacturers have complied without apparent difficulty, as there never was a judicial challenge until this litigation was filed in late 2002.[3]

2. Shortly after the Commission was created, in 1975 Congress enacted the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871 (1975). EPCA, which Congress has since amended on several occasions,[4] provides federal executive branch agencies with various authorities relating to energy production and conservation, including the energy efficiency of major appliances, *see* 42 U.S.C. §§ 6293-95, 6313-15. Since its enactment, EPCA has also included an express preemption provision, *id.* § 6297(a)(1). That Section preempts specified types of state "testing and labeling requirements," including the "disclosure of information with respect to any measure of energy consumption or water use of any covered product if" the state regulations require "testing," the use of a "measure of energy consumption," or "disclosure of information," that is "other than" what is provided or required under EPCA.

---

[3] See Decl. of Valerie T. Hall in Supp. of Defs.' Mem. of P. & A. in Opp. to Pls.' Mot. for Prelim. Inj. (Nov. 18, 2002) (hereinafter "Hall Decl."), at ¶ 5 & tbl.1, No. CIV S 02-2437 WBS PAN (E.D.Cal.); Suppl. Decl. of R. Michael Martin at ¶¶ 9, 22 & App. ("hereinafter "Martin App.") (included in Defs.' Opp. To Pls.' Mot. for J. on the Pleadings (May 6, 2003), No. CIV S 02-2437 WBS PAN (E.D.Cal.)).

[4] *See, e.g.*, Pub. L. No. 95-619, 92 Stat. 3206 (1978); Pub. L. No. 100-12, 101 Stat. 103 (1987); Pub. L. No. 102-486, 106 Stat. 2776 (1992); Pub. L. No. 109-58, 119 Stat. 594 (2005).

3. Petitioners, four associations of appliance manufacturers, filed a complaint in federal district court seeking a permanent injunction against enforcement of the Commission's appliance data-submittal and marking regulations on federal preemption grounds. The district court granted injunctive relief, Pet. App. 23a-44a, and the court of appeals reversed, Pet. App. 1a-20a.

The appellate court concluded that § 6297(a)(1) does not preempt the data-submittal regulations because "disclosure of information," within the meaning of that Section, "only refers to consumer-directed labeling at [the] point of sale or use," not to data-submittal to the states. Pet. App. 12a. The court also concluded that the challenged appliance-marking regulations are not preempted. *Id.* 13a-20a. The court reasoned that the regulation requiring all appliances to be marked with the manufacturer's name (or brand name or trademark), the model number, and the date of manufacture is not preempted because such data is not "with respect to any measure of energy consumption," within the meaning of § 6297(a)(1). *Id.* 13a-16a. The court also held that the regulation requiring marking of "commercial and industrial equipment" with basic energy data is not preempted because it does not require information "other than information required under [federal law]," § 6297(a)(1)(B). *Id.* 17a-19a.

REASONS FOR DENYING THE PETITION

The decision below does not present an important issue of federal law, it does not conflict with any decision of any other court, and it correctly rejected petitioners'

preemption claim. The petition should, accordingly, be denied.

1. The decision below does not present an important issue of federal law warranting this Court's review. Petitioners' preemption claim rests entirely on the meaning of a statutory provision, 42 U.S.C. § 6297(a)(1), that Congress enacted three decades ago and that has remained unchanged, in any significant manner relevant to this case, since then. *Compare* 42 U.S.C. § 6297(a)(1) *with* Pub. L. No. 94-163, sec. 327(a)(1), 89 Stat. 871, 926-27 (1975) ("This part supersedes any State regulation . . . provid[ing] for – [¶] (1) the disclosure of information with respect to any measure of energy consumption of any covered product. . . . [¶] if there is a rule under section [6294] applicable to such covered product and such State regulation requires disclosure of information other than information disclosed in accordance with such rule. . . ."). Yet this case is the very first time that any court has construed the meaning of § 6297(a)(1), even though the Commission imposed many of the data-submittal requirements as long ago as 1977.

The complete absence of any other litigation, in California or any other state, raising this same claim should, standing alone, be preclusive of the merits of the petition. A petition that presents a statutory construction issue that has been raised only once during the thirty years of the statute's existence cannot possibly present the "compelling reasons" or "important federal question"

necessary under this Court's rules for a grant of certiorari. Sup. Ct. R. 10.[5]

2. Notwithstanding the absence of any other cases construing § 6297(a)(1), petitioners gamely insist that this case presents a circuit conflict. Pet. 14-21. They do so by proposing the existence of an abstract conflict concerning one particular part of the "interpretive methodology," Pet. 13, used in construing express preemption provisions in federal statutes – the "presumption against preemption." That invented conflict, however, does not support this Court's review.

Contrary to petitioners' assertion, the court below in no manner overrode the "plain meaning" of § 6297(a)(1) with a "presumption against preemption." In the first place, both the district court and the court of appeals concluded that the key statutory term – "disclosure of information" – has no "plain meaning"; rather, it is ambiguous. Pet. App.

---

[5] The absence of any litigation also belies petitioners' exaggerated claims, Pet. 23-24, of the alleged harm caused by the Commission's regulations. With regard to the data-submittal regulations, the burdens about which petitioners complain are mainly related to requirements not even at issue in this case, such as those directed to appliances outside the scope of federal law or to data items whose submittal is voluntary; others merely refer to data items that are produced during the federal tests, for which obviously there is no burden. *See* Cal. Code Regs. tit. 20, §§ 1602(f), 1603 (Exception), 1605.3(f)(1)-(2), 1606(a)(3)(D) & tbl.V; Hall Decl., *supra* n.3, at ¶¶ 13-16 & tbls.1, 3; Martin App., *supra* n.3. Similarly, most of petitioners' complaints about the marking regulations are based on the claimed need to change manufacturers' "date codes" or to re-mark units that have been shipped from the factory, but not sold, before the regulations take effect. But the regulations allow the use of *any* date code, § 1607(b)(3), (c)(3), and each provision of the regulations applies *only* to units manufactured after the provision's effective date, § 1601, 1st para., so any unit shipped before the effective date of a marking provision would not have to be re-marked.

6a, 37a. Petitioners agreed with this characterization in the courts below. *E.g.*, Pls.-Appellees' Br. 20 (Jan. 6, 2004), 2004 WL 297736.

Furthermore, in assessing the merits of petitioners' preemption claim, the appellate court did just what courts routinely do in such cases: discern congressional intent by carefully analyzing the statutory language, Pet. App. 7a, the statutory structure, *id.* 7a-8a, relevant federal regulations, *id.* 8a n.5, and the legislative history, *id.* 8a-12a. Relying on all of those factors, the court concluded that the term "disclosure of information" in § 6297(a)(1) does not preempt the kinds of state data-submittal requirements at issue here, which do not call for "disclosure of information" to consumers, but instead require only the submittal of data to a state agency with regulatory authority over the relevant products. Pet. App. 6a-12a. The court used similar, ordinary tools of statutory interpretation to reject the preemption claims concerning the marking regulations. *Id.* 13a-20a.

In reality, then, what petitioners characterize as a case presenting some kind of transcendental circuit court dispute over "interpretive methodology" is no more than a garden-variety case of statutory construction. No doubt there are some incidental differences in wording in federal appellate opinions concerning the precise implementation of this Court's oft-repeated declaration that "'*we start with the assumption* that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" *United States v. Locke*, 529 U.S. 89, 108 (2000) (emphasis added) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). One would hardly expect the exact same words to be used in opinions applying a wide variety of preemption schemes